Gaines v. Hennen, 24 How.

United States Supreme Court.

December Term, 1867.

MYRA CLARK GAINES, Complainant and Appellant,

No. 81. *versus*

F. De. De LaCROIX ET AL.

MYRA CLARK GAINES, Complainant and Appellant,

No. 82. *versus*

CITY OF NEW ORLEANS ET AL.

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No. 83. *versus*

MANUEL J. LIZARDI ET ALS.

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These three cases constitute the seventh, eighth and ninth appeals to this court of the celebrated controvesy known as the "Gaines case." For more than one third of a century, in one form and another, it has been the subject of judicial decision in this court, until the present complicated and voluminous record reaches nearly eight thousand printed pages.

It was before this court upon mandamus in 1839—13 Pet. 404—and again in 1841, upon a certificate of division of opinion between the Circuit Judges. 15 Pet. 9.

It was here upon demurrer in 1844, 2 How. 619, and again in 1848, upon its merits, 6 How. 550, when the decision was in favor of complainant as "forced heir" of Daniel Clark.

This decision was partially modified in 1851. 12 How. 472. In 1855 the will of Daniel Clark of 1813, having been probated by the Supreme Court of Louisiana, this case was here again in 1860, 24 How. 555, when her rights as universal legatee under the will of Daniel Clark of 1813, and her status as his legitimate child, were fully established.

The court in giving its opinion in that case—Gaines vs. Hennen, 24 How. 555, said: "Thus, after a litigation of thirty years, has this court adjudicated the principles applicable to her (Mrs. Gaines') rights in her father's estate. They are now finally settled." Yet there are now before this court these three cases, in which the defendants seek for a reversal of the principles that "finally settled her rights" in that decision, and they come, too, upon the very same issues raised by the very same pleadings, and supported by the identical evidence upon which the Hennen case was decided; and there are more than one thousand defendants in the Circuit Court of Louisiana, ready to come here, unless this Court shall reverse or affirm that decision in such terms as shall conclude this controversy forever.

I.

STATEMENT OF THE CASES.

As these three cases present substantially the same issue and pleadings, and depend upon the same evidence, but one brief will be presented for all.

They come here upon appeal by complainant from the Circuit Court of the District of Louisiana, in which judgment was rendered against complainant in 1858 and in 1860.

They are bills in equity, filed by complainant, April 9th, 1856 (De La Croix, No. 81)—Dec. 22d, 1856—(City of New Orleans, No. 82)—and March 27th, 1857. (M. J. Lizardi et als., No. 83) against certain defendants therein named, in which she seeks to recover certain real estate and slaves (De La Croix) situated in New Orleans, and the rents and revenues and civil fruits thereof, which belonged to Daniel Clark, her father, who died in New Orleans in 1813, the complainant claiming title thereto under his last will of 1813 as universal legatee.

The material allegations of each of the Bills are—

1st. That complainant is the only legitimate child of Daniel Clark.

2d. That all the property sought to be recovered therein belonged to Daniel Clark at his decease in August, 1813.

3d. That at his death he left a valid last will and

testament (called the will of 1813) in which complainant was declared his "only legitimate child," and made his universal legatee, subject to certain payments, etc., in which Pitot, De La Croix and Bellechasse were appointed executors.

4th. That said will of 1813, having been lost or destroyed, it was duly recognized and admitted to probate by the Supreme Court of Louisiana in 1856, and ordered to be executed.

5th. That Daniel Clark made a provisional will in 1811 (called the will of 1811) in which he made his mother, Mary Clark, his universal legatee and sole heir, and appointed Richard Relf and Beverly Chew the testamentary executors thereof; which will of 1811 was revoked by the will of 1813, but that Relf and Chew fraudulently obtained the probate of the will of 1811, and illegally administered the estate under it.

6th. That all the defendants are in possession of some ortion of Daniel Clark's property, claiming title thereto, through sales made by Relf and Chew, as executors of the will of 1811, and as agents of Mary Clark, sole legatee under that will, all of which sales are illegal and made fraudulently and with notice of complainant's equities, etc.

7th. That complainant was a minor until 1827, and ignorant of her parentage and rights in her father's estate until 1834, and from that time to the present she

persistently claimed this estate and diligently sought its recovery by all the legal means in her power.

8th. To maintain her bill she seeks a discovery from defendants, and prays for a delivery of the property to her, and for an account of the rents and profits. and for general relief.

The answer of each defendant admits the possession in them of the property claimed in the bill, and that the *legal* title thereof was in Daniel Clark, at the time of his death, in 1813; but they claim that Dauiel Clark's title to the same passed to them or their grantors by virtue of certain sales made by Relf & Chew, as testamentary executors of the will of 1811, and as agents of Mary Clark, "sole heir and legatee" of the will of 1811. They also set up certain outstanding titles in Mary Clark and Caroline Barnes, as forced heirs of Daniel Clark, and an equitable title to two thirds of the property in Relf & Chew, and creditors of Clark, by virtue of certain partnership articles, of June 19th, 1813.

They also rely upon the nullity of the probate of the will of 1813, by the Supreme Court of Louisiana, in 1856, and set up the decision of this court in Gaines vs. Relf et al., 12 How. 472 as *res judicata*, both as to complainant's status and as to her title.

They also plead the prescription of five, ten, twenty, and thirty years; and that they are "purchasers in good faith, without notice, for a valuable consideration;" and

that they are purchasers from "purchasers in good faith, without notice, for a valuable consideration."

They also set up several formal objections to the bill, such as that there is no equity set forth in the bill, and that complainant has an adequate remedy at law, and the want of proper parties, etc.

Upon these issues judgment was rendered against complainant in the United States Circuit Court for Louisiana, and she has taken an appeal therefrom to this court.

II.

DEFENDANTS IN EACH CASE.

The only defendant before this court in De La Croix case, No. 81, is Daniel Hypolite Dusuau De La Croix, who defends as executor and heir of his father's estate, F. De La Croix, the original defendant, who died during the pendency of the suit, which was revived against him as heir and executor.

The present parties in Gaines vs. City of New Orleans et al., No. 82, are the City of New Orleans and H. E. Lameyer upon the merits, all the other defendants having been discharged and no appeal taken as to them.

In Gaines vs. Lizardi et als., No. 83, the defendants in appeal are Paul Pesquier, Widow Ramon Massana, Elizabeth Minturn, Heloise Minturn, N. Dabon, and J. J. Lamoine, upon pleas to the jurisdiction, and John Slidell, John Diamond, Elisa Paul Seneschal, (revived against Isabella Jenkins,) and Wm. Creppel, upon the merits.

TIME OF THE APPEAL.

A preliminary question arises as to the City of New Orleans, H. E. Lameyer, Paul Pesquier, and Widow Ramon Massana.

Was the appeal taken as to those defendants within the time allowed by law?

The judiciary act of 1789 and acts supplemental thereto, provided that an appeal can be taken only within five years from the rendering of the decree complained of, with certain exceptions of imprisonment, etc.

The decree as to the City of New Orleans and H. E. Lameyer was rendered April 25, 1858, (Record, vol. 1, p. 77,) and the appeal taken June 17th, 1865, (Record, vol. 1, p. 79) seven years one month and twenty five days afterwards.

The judgment in favor of Paul Pesquier and Widow Ramon Massana, was rendered Dec. 4th, 1857. Record, vol. 1, p. 978.

The appeal was taken April 13th, 1865, seven years four months and eight days after the judgment. Record, vol. 1, p. 958.

These appeals were within the time allowed by law, because,

1st. Appellant comes within the exception of said Act of 1789, chap. 20, sec. 22, in this, that she was imprisoned more than two years, four months, and eight days within the five years allowed her by law for this

appeal. See pet. of appeal, vol. I, p. 79, and vol. 2, p. 958, and complainant's affidavit.

This time excluded, brings the appeal within five years.

2nd. Because by reason of overpowering force there was no United States Circuit Court in existence, practically, in Louisiana, (the court from which this appeal was to be taken, from Jan 30th, 1861, to June 24th, 1863, a period of more than two years, four months and twenty-four days.

a. The court will take judicial notice of this fact.

b. See pet. of appeal, vol. 1, p. 79, and vol 2, page 958.

c. See certificate of clerk of Circuit Court, District of Louisiana.

3d. This appeal is expressly allowed by the act of Congress of March 2d, 1867. See act relating to appeals and writs of error to the Supreme Court.

III.

PLEAS TO THE JURISDICTION OF PESQUIER AND MASSANU.

The only question before the court as to defendants, Pesquier and Massana, is upon the plea to the jurisdiction. Complainant alleges in her bill, (vol. 1, p. 1,) that Pesquier and Massana are each citizens of the State of Louisiana, and *resident* in the Eastern District of Louisiana, and that she is a citizen of the State of New York. The bill was filed March 27, 1857. These allegations give jurisdiction so far as it depends upon the character of the parties in that respect. Each of these defendants file a plea June 1st, 1857, to the jurisdiction, vol. 1, p. 943-949, denying the allegation of their citizenship, and alleging that they are aliens, and that they *now*, (at time of filing the plea,) are residents, the one of France, and the other of Spain.

The pleas are precisely alike, and we give one of them, that of Massanu, as follows :

The Plea of Teresa Pena, the widow of the late Ramon Massana, herein impleaded, as Widow Ramon Massana, to the bill of complaint, in the above entitled cause.

1st Plea.—This defendant, Teresa Massena, born Pena, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's said bill of complaint mentioned to be true, in such manner and form as the same are therein and thereby

set forth and alleged, doth plead thereunto, and for plea saith that she, the said named defendant, is an alien, born in foreign parts, that is to say in the kingdom of Spain, under the allegiance of a foreign Sovereign, that is to say, the Queen of Spain; that she is not, and never hath been, a citizen of the United States, and is not, as alleged in the complainant's bill of complaint, a citizen of the State of Louisiana, and that she NOW RESIDES in the Kingdom of Spain, and is in no manner answerable to the jurisdiction of this Honorable Court, in this behalf; all which matters and things the defendant doth aver to be true, and pleads the same to the whole of the said bill, and humbly demands the judgment of this Honorable Court whether she ought to be compelled to make any answer to said bill of complaint; and humbly prays to be dismissed, with her reasonable costs in this behalf, most wrongfully sustained.

The defendants, by their pleas, do not deny the allegation of *residence in Louisiana when the bill was filed*, and therefore admit they were residents there March 27th, 1859, the time of filing the bill, which is the time when jurisdiction attaches; but only allege they *now reside* in France and Spain; and upon the authority of Molan et als. vs. Torrance, 9 Wheaton, 537, this must refer to the time of the plea pleaded, (June 1st, 1857,) and not to the time of filing the bill.

In that case this precise point was raised and the court held that in a plea to the jurisdiction, the allega-

tion "*are* citizens" refers in point of time to the *time* of pleading the plea, and not to the time of bringing the action. The court says:

"It is quite clear that the jurisdiction of the court depends upon the state of things at the time of the action brought, and that after vesting it cannot be ousted by subsequent events. Since, then, one of the counts shows jurisdiction, and the plea does not contain sufficient matter to deny that jurisdiction, we think that judgment ought not to have been rendered on the demurrer, in favor of defendant."

The case, then, upon the pleadings, is this: a citizen of New York sues an alien *residing in Louisiana*, in the United States Circuit Court, for that district. In such a case the jurisdiction is clear, if the character of the parties as to citizenship and alienage are properly alleged.

The precise question in this case is this: had the Circuit Court jurisdiction in this case, when the bill alleged the character of the defendant sufficiently, if true, to give jurisdiction, to-wit: citizenship and residence in Louisiana, and defendant denies that character as to citizenship and alleges another, to-wit: alienage, with residence in Louisiana, which equally gives jurisdiction? In other words, can the averments of defendant's plea be used by plaintiff to support jurisdiction?

If defendant had plead to the jurisdiction that complainant was not a citizen of New York, but was a citizen of Pennsylvania, this would not have avoided jurisdiction, yet in principle it would be the same plea as the present.

That the character of the parties upon which jurisdiction depends must be alleged *somewhere* in the record is well settled.

But may not a plaintiff who has himself made proper allegations to support jurisdiction, resort to the defendant's averments to maintain that jurisdiction, when defendant's averments differ from plaintiff's only in *name* and not in the *quality of giving jurisdiction.*

It is sufficient if the bill and *proceedings* state the character of the parties.

Jackson et al. vs. Ashton, 8 Pet. 148.

The object of averring the character of the parties is that the *record* shall show jurisdiction.

Jackson vs. Twentyman, 2 Pet. 136.

This can be attained as well by defendants as by plaintiff's allegations, provided there be *no time when jurisdiction does not appear from one or the other.*

This is not a case where jurisdiction did not appear upon the record until shown by defendant's averments.

In Bradstreet vs. Thomas, 12 Pet. 59, there was no averment by plaintiff as to defendant's citizenship ; but in a joinder in demurrer, by plaintiff, long after, the proper averment was made, and the court held this to be a sufficient allegation of the character of the parties.

This certainly shows that the court may look *beyond the original bill of complainant* to find the proper averments, and it is difficult to see why defendant's averments, in his plea, are not as good to support jurisdiction, as those in plaintiff's joinder in demurrer, as in the case of Bradstreet vs. Thomas, 12 Pet. 59.

In Montelet vs. Murry, 4 Cranch., 46, the right of a plaintiff to resort to the averments of defendant to cure a defective averment of the character of the parties is clearly implied.

This was a suit by a citizen endorsee of a note, against an alien maker of the note, with no allegation of the citizenship or alienage of the payee of the note, as required by law.

Plaintiff contended that by the plea of the defendant, the payee was alleged to be an alien.

Thereupon the court decided the case *upon the ground that they had no jurisdiction between aliens*, that is, that plaintiff could not maintain his action because the payee could not, he and the maker both being aliens.

Now, before the court could have decided that case *upon that ground*, they must, of necessity, have assumed that plaintiff's omission to aver the character of the payee, was supplied by the averment in defendant's plea that payee was an alien, otherwise they would have decided against plaintiff, *on the ground that he had not averred the character of payee, and not on the ground that he had shown it, and that it was wrong, to-wit, that he was an alien.*

It is therefore respectfully submitted that when a complainant, as in this case, shows by a proper averment, so far as depends upon the character of the parties, that the court have jurisdiction, and defendant denies the particular fact alleged by plaintiff to give jurisdiction, and avers in its place another fact, that

equally gives jurisdiction, that this court will maintain the jurisdiction, and overrule the plea.

IV.

N. DABON, J. J. LAMOINE, HELOISE DAUPHINE, ELIZABETH DAUPHINE.

The only question before the Court, as to these defendants, is also as to a question of jurisdiction.

Each of these defendants filed three pleas to the jurisdiction, which were sustained by the Circuit Court.

These pleas being legally the same (Lizardi Record, Vol. 1, p. 944 to 947), one of them only is given as follows:

Pleas of Elizabeth Dauphine and Heloise Dauphine, f. p. c., herein impleaded as Elizabeth and Aloyse Minturn, two of the defendants, to the Bill of Complaint of Myra C. Gaines, the complainant in the above entitled cause and number, on the equity side of this Honorable Court.

FIRST PLEA.

Two of the defendants, Elizabeth and Heloise Dauphine, herein impleaded as Elizabeth and Aloyse Minturn, for themselves, and each and separately for herself, by protestation not confessing or acknowledging all or any of the matters and things in said complainant's said bill of complaint mentioned to be true in such manner and form as the same are therein and hereby set forth and alleged, doth plead thereunto, and for this their first plea say that the said complainant is

a woman, and as such is not a citizen, as she hath alleged, of the State of New York, nor can she be in any constitutional or legal sense a citizen of the United States; and, therefore, the said defendants, and each for herself respectively, both deny the allegation of complainant that she is a citizen of the State of New York; all which matters and things these defendants do aver to be true, and plead the same to the jurisdiction of this Honorable Court, and to the whole of the said bill of complaint, and humbly demand the judgment of this Honorable Court whether they, or either of them, ought to be compelled to make any answer to the said Bill of Complaint; and they humbly pray to be hence dismissed, with their reasonable costs in this behalf most wrongfully sustained.

SECOND PLEA.

The said defendants, and each individually, to-wit: Elizabeth and Heloise Dauphine, impleaded herein as Elizabeth and Aloyse Minturn, for themselves and each for herself, by protestation, not confessing or acknowledging all or any part of the said bill of complaint, in manner or form, as the matters and things are therein and thereby set forth and alleged, for themselves and each for herself, plead thereunto, and for their second plea say, that in and by the bill of complaint herein, it is recited, set forth and thus charged that these defendents, Elizabeth Dauphine and Heloise Dauphine, in the said bill of complaint called Elizabeth Minturn and

Heloise Minturn, together with the other defendants in said bill of complaint named, are citizens of the State of Louisiana; whereas, these defendants, and each for herself, doth specially and specifically deny said allegation in said bill contained, and humbly prays the judgment of this Honorable Court whether they or either of them shall be compelled to make any answer to said bill of complaint; and pray to be hence dismissed with their costs most vexatiously and wrongfully sustained.

THIRD PLEA.

The said two defendants, Elizabeth and Heloise Dauphine, impleaded herein as Elizabeth and Aloyse Minturn, respectfully for themselves and each for herself, by protestation, not confessing or acknowledging all or any of the matters and things in said complainant's bill of complaint mentioned as true in such manner and form as the same are therein and thereby set forth and alleged, do plead thereunto, and for this their third plea, say that the said complainant hath, in and by her bill of complaint herein charged that these said named defendants (together with the other defendants in the bill named) are citizens of the State of Lousiana, which said charge and allegation is made to the end and intent that this Honorable Court may appear and, in fact, have jurisdiction to hear and determine the matters and things set forth in said bill of complaint, under the constitution and laws of the United States; whereas, these defendants, and each for herself, doth

aver that they are not, nor is either of them a citizen of the State of Louisiana or of any other State of this Union, or of the United States of America; they aver that their political, legal and social status is irrevocably fixed and determined by universal law, usage and custom, as also by the local laws of Louisiana, her usage and customs, to be the same as that of the mother from whom they were born; that their mother was named Pelagie Dauphine, and that their said mother was at the time when they were respectively begotten and born, a free woman of color, and was regularly descended from the ancient people called Africans; that these two said named defendants are, therefore, each respectively free people of color; that by the constitution of society, the laws of the State of Louisiana and the usages of the same time out of mind, all persops having the status which these defendants respectively have, are positively excluded from all rights of citizenship, political, legal and social; that they are not allowed by law to presume to think themselves equal to a citizen; they distinctly aver that they are not citizens in the sense used by the constitution of the United States in defining and limiting the jurisdiction of the Courts of the United States, especially in matters pertaining to controversies arising between citizens of different States.

They aver that their father's name was John Minturn, a white male citizen for many years domiciliated in the State of Louisiana, but now deceased; that their said parents were never married, because, by the laws

of Louisiana, they could not be, inasmuch as that the status of their mother was that of a descendant of the African race, and hence was not a citizen, and could not intermarry with a free male citizen of the State of Louisiana; all of which matters and things, these two defendants do severally aver to be true, and plead the same to the jurisdiction of this Honorable Court, and aver that, in consequence thereof, this Honorable Court is wholly without constitutional or lawful jurisdiction over the persons of these defendants, or either of them, to hear or determine the matters of controversy raised by said bill of complaint, as between the complainant and these defendants respectively; all of which matters and things these defendants do aver, respectively and severally, to be true, and plead the same to the jurisdiction of this Honorable Court in the premises in this behalf, and humbly demand the judgment of this Honorable Court whether they, or either of them, ought to be compelled to make any answer to said bill of complaint, and humbly pray to be hence dismissed with their reasonable cost in this behalf most wrongfully sustained.

(Signed) DUNCAN & McCONNELL,
Solicitors for Defendants.

V.

The general objection which applies to all of these pleas, is that a defendant in equity cannot plead more than one dilatory plea without leave of the Court, and

the record shows that no such leave was obtained by defendants:

There can be but one plea to the jurisdiction.

Wellford's Eq. Pl. p. 311, and cases cited.

Story's Eq. Pl. Sec. 657, and cases cited.

Before the Statute, 4 Ann. chap. 16, sec. 4, two pleas in bar or in abatement, could not be pleaded, but that Statute was confined to pleas in bar.

"The power of pleading several matters extends to pleas in bar only, and not to those of a dilatory class with respect to which the leave of the Court will not be granted."

Stephens Pl. p. 277.

Only one plea shall be admitted to the jurisdiction.

Daniel Ch. Prac., 3 Am. ed. p. 653.

Saltus vs. Tobias, 7 Johnson Ch. 214.

SPECIAL OBJECTIONS TO EACH PLEA.

First Plea.—The objection to the first plea of each is this: the averments of fact in the plea do not prove the issue of law.

They aver that complainant is a woman and, therefore, cannot be a citizen of any State.

It is well recognized law that a woman can be a citizen of the United States or of any State.

Dred Scott vs. Sandford, 19 Howard, p. 442.

Second Plea.—The second plea of each, although called a plea to the jurisdiction, is simply a *traverse* of complainant's allegation of citizenship. But a question of citizenship affecting jurisdiction, cannot be raised in

this way, but must be raised by a proper plea to the jurisdiction.

Shephard vs. Graves, 14 How. p. 506.
De Wolf vs. Rabaud, 1 Pet. 476.

But even if the question could be raised by a *traverse*, this is fatally defective in *not tendering an issue*; or if new matter is alleged by an offer of verification, neither of which does this plea do.—Stephen's Pl. p. 230, 231, 233.

Another objection which applies to the second plea of each is that two defendants have united in each plea, which plea is to be necessarily supported by two different series of facts.

Dabon's want of citizenship is proved by one series of facts, and Lamoine by another. They may be similar, but not the same.

This can not be done, any more than two plaintiffs, each having a separate cause of action, can unite in one suit against a defendant.

The second pleas of each are fatally defective in this: They violate the cardinal principle of pleading that each plea shall present but *one issue*. Here there are two issues in each plea, to-wit: Is Dabon a citizen? Is Lamoine a citizen? Is E. Dauphine a citizen? Is H. Dauphine a citizen?

Story Eq. Pl., sec 654.

"It may then be laid down as a rule that various facts can never be pleaded in one plea unless they are all conducive to a single point."

Daniels Ch. Pr., p. 634.

A multifarious plea containing distinct points is bad. "Every plea must rest the defence upon a single point."

Goodrich vs. Pendleton, 3d Johnson Ch. Rep. 385.

In the State of Rhode Island vs. the State of Massachusetts, 14 Pet., p. 210, the court, after elaborate argument, laid down the rule of equity pleadings upon this point, as follows:

It is a general rule that a plea ought not to contain more defences than one. Various facts, therefore, can never be pleaded in one plea, unless they are all conducive to a single point. This is so well settled that it is unnecessary to refer to many adjudged cases to support it.

Again, if the court could treat it as a plea, in abatement to the jurisdiction, it is fatally defective in not averring where the jurisdiction is—of what State he or she is a citizen, or whether an alien, or an outcast, so that complainant might correct the mistake by amendment or otherwise.

Stephens' Pl. 432.

"In pleading a mistake of form in abatement of the writ or declarations, the plea must at the same time correct the mistake so as to enable the plaintiff to avoid the same objection in framing his new writ or declaration."

Lord Thurlow says in Crabot of Arcat vs. East India Co., 1st Vesey, p. 371:

"It is impossible to plead to the jurisdiction of a particular court without giving a remedy to the party in some other court."

In the present case it is peculiarly requisite that they should aver their status as to being an alien—a citizen

of some State—or an outcast; because, if they say they are aliens, which is not inconsistent with their plea, then the bill having averred them to be residents of Louisiana and this fact not being denied, the record would show that they are "aliens, resident in Louisiana," which gives this court complete jurisdiction, as we have shown in the case of Pasquier and Massana, (brief ante, p. 9).

THIRD PLEA.

The third plea, which is more properly a plea to the jurisdiction, admits (by not denying the allegations in the bill) that defendants are residents of Louisiana, and avers, stripped of its surplusage, that defendants are each *free colored persons of African descent*, and therefore cannot be citizens of the United States, nor of Louisiana.

Now, applying the well known rules of pleading to this plea, if the facts in those averments may all be true, and yet defendants may be legally citizens of Louisiana, the plea is clearly insufficient.

This plea was filed soon after the Dred Scott decision, and was supposed to be supported by that decision; but far as that case went against color and race, it by no means supports such a proposition as this.

In that case, 19 How., p. 403, the court say: "The plea applies only to that class of persons whose ancestors were negroes of the African race and imported into this country and *sold and held as slaves*."

There is no averment here that defendants or their

ancestors were ever slaves, which is the essential fact upon which the Dred Scott decision was based.

We might rest the answer to this plea upon the broad proposition laid down by Judge Gaston of North Carolina in the case of the State vs. Manuel (4 Dev. and Bat. 20). "All free persons born within the State are citizens of the State."

That color and race are not incompatible with citizenship of the United States, or any State, see the Treaty with the Choctaws, of May 23d, 1836, Art. 14 U. S. Stat. at Large, vol. 7, p. 333, by which men of color and of a different race were admitted citizens of the United States.

But we do not propose to show that *all free colored persons of African descent* residing in Louisiana at the time of filing this plea, 1857, were citizens, nor that these defendants were citizens of Louisiana. It is enough to show the insufficiency of this plea, to prove that *some persons of that description* might be citizens of Louisiana; in other words, to show that the averments of the plea do not *necessarily* prove that these defendants were not citizens of Louisiana when the bill was filed.

"A citizen of the United States, residing in any State is a citizen of that State" for the purposes of jurisdiction.

Gassies vs. Ballou, 6 Pet 761.

"The Constitution does not limit the power of Congress in this respect (giving citizenship) to white per-

sons. And they may, if they think proper, authorize the naturalization of *any one of any color.*"

Dred Scott case, 19 How. 419.

That the United States have made *some free colored persons of African descent,* residing in Louisiana, citizens of the United States, and therefore citizens of Louisiana (Gassies vs. Ballou) will appear as follows:

1st. Under the Acts of Congress and the treaty making power of the United States, all those *free colored persons of African descent,* who resided in the country, which is now Louisiana, at the time of the cession of that territory from France to the United States in 1803, and at the time of the admission of Louisiana into the Union, in 1811, or descended from such ancestors, were citizens of the United States and also of Louisiana.

That there were free persons of color of African descent in the territory of Orleans (now Louisiana) at the time of the cession and admission of Louisiana into the Union is apparent.

(*a.*) As a matter of history, of which the court will take notice, see Gayarre's History of Louisiana, p. 333, vol. 3, and letter of Claiborne to Gen. Jackson, in which he writes:

"Among the militia of New Orleans there is a battalion of *chosen men of color,* organized under a special act of Legislature."

"Under the Spanish government *the men of color* of New Orleans were always relied upon in times of

difficulty, and on several occasions evinced in the field the greatest firmness and courage."

As none but free men could form a part of the territorial militia. it necessarily results that there were free men of color in Louisiana at that time.

(*b.*) It is proved by the laws of the territory, made for that class of population.

Territorial Laws of 1806, Greiner's Digest, p. 220, sec. 1515, provides for offences committed by "free negroes," which necessarily means free persons of color of African descent, and proves also that such a class of persons were residing in the territory.

Acts of Louisiana passed September 6th, 1812, Martin's Digest, p. 104, vol. 2, authorized a military company to be formed for the defence of the State by *certain free men of color* who had paid a State tax.

The territorial act of 7th June, 1806, recognizes them as residents in Louisiana.

See law of 1806, p. 129.

Act of June 7, 1806, sec. 2, 21, 40. All distinctly recognise them as residents of Louisiana. P. 128, 164, 138.

Act of 1806, May 20. They were included in the census as inhabitants of the territory.

Laws of 1806, p. 20.

The above authorities establish the fact that there were among the *inhabitants* of the land ceded by France to the United States by the Treaty of Paris, April 30, 1803, and residing there at the time of the admission

of Louisiana into the Union in 1811, free persons of color of African descent.

They were recognized by Congress as a part of the people who were to form the future sovereignty of the State of Louisiana.

The act passed March 2d, 1805, to govern the territory of Orleans, provided in the 7th section, that when, by actual census, it was ascertained that the *free inhabitants* of the territory amounted to sixty thousand, they might form for *themselves* a constitution, etc.

This necessarily includes all free colored persons of African descent, and shows that the Constitution of Louisiana was to be formed for them, as well as free white persons.

They were also eligible so far as race and color was concerned, to be a part of the legislative power of the territory.

The act of Congress by which the territory was created, passed March 26, 1804, sec. 4, only requires for that purpose that they should be *a person* fit and discreet, own real estate, and reside in the territory for one year.

They could also inherit real estate and transmit real estate by will.

Old Code, p. 158, art. 64.

The third article of that treaty (Stat. at Large, vol. 8, p. 200) provides that "the *inhabitants* of the ceded territory shall be *incorporated in the Union of the United States* and admitted as soon as possible, according to the

principles of the Federal Constitution, to the enjoyment of all the rights, advantages and immunities of *citizens of the United States.*"

By the act of delivery of this territory by France, through citizen Peter Clement Laussat, Dec. 20th, 1803, to Claiborne and Wilkinson, agents of the United States, France discharges from their oaths of fidelity towards the French Republic the citizens and *inhabitants* who choose to remain under the dominion of the United States.

White's new Recopilacion, p. 226, vol. 2.

By act of Congress, Feb. 26th, 1811, (Stat. at Large, vol. 2, p. 641,) "An Act to enable *the people* of the Territory of Orleans, etc., to be admitted into the Union *upon an equal footing* with the original States," it is provided that *the inhabitants* of that territory, etc., are hereby authorized to form for *themselves* a constitution, etc.

Sec. 2d provides that all free white male citizens of the United States, and *all other persons* having the legal qualifications to vote for representatives, etc., may vote for delegates to the convention to form a Constitution.

By the Territorial laws, all free persons having a certain property qualification could vote for representatives. Color and race did not exclude them.

Acts of 1806, June 4th, sec. 8. Laws of 1806, p. 821.

By Act of Congress 26th March 1804, sec. 12, all inhabitants between 18 and 45 years of age, formed the

militia of that territory, without distinction of color or race.

The word inhabitant is broad enough to include free persons of color of African descent.

"The term free inhabitants, in the generality of its terms, would certainly include one of the African race who had been manumitted."

Opinion of the Court in Dred Scott case,
19 How., p. 418.

It is therefore plain that by solemn treaty the United States were bound to admit into the Union, *with all the rights of citizenship*, free persons of color of African descent who were inhabitants of that territory at the time of the treaty, and that by the act of admission of Louisiana, they did admit into the Union as citizens of the United States, all such persons as resided therein at the time; and being thus citizens of the United States, and residing in Louisiana, *for all purposes of jurisdiction*, they were citizens of Louisiana, and once being citizens, they and their descendants are presumed to continue such, till the time of filing this plea, 1857.

That Louisiana did not concede to this class all their rights as citizens may be quite true, as alleged in the plea. That is a matter of taste for Louisiana; but certain it is that she was utterly powerless to deprive any person of his rights of being a citizen of the United States, when made so by the solemn treaty of his Government.

"Undoubtedly. a person may be a citizen, that is a

member of the community who form the sovereignty, although he exercises no share of the political power, and is incapacitated from holding particular offices."

Dred Scott Case, 19 How., p. 422.

"The possession of political power is not essential to constitute a citizen."

State vs. Manuel, 4 Dev. & Bat. 20.

That the effect of that treaty and of the admission of Louisiana into the Union, was to make all free persons residing therein, citizens of the United States, is decided by the Supreme Court of Louisiana, in Dubois' case, 2 Martin, p. 185.

By a rule of court, none but citizens of the United States could be admitted to the bar of Louisiana. Desbois claimed admission as a citizen, upon the ground that although an alien born, yet that he became a citizen by virtue of that treaty, and the admission of Louisiana, he being a resident in Louisiana at the time of her admission into the Union.

The court, in a very elaborate opinion, decides that the effect of that treaty was to make an alien a citizen, and by necessary implication, to make all free inhabitants of Louisiana, citizens of the United States.

In United States vs. Laverty, 23 Martin, 733, it is distinctly decided that any *inhabitant* of Louisiana at the time of her admission into the Union, became a citizen of the United States.

The same opinion as to the effect of that treaty, was held by other eminent jurists.

Opinion of Mr. Justice McLean, in Dred Scott case, 19 How., p. 533.

Opinion of Mr. Justice Curtis in same case, p. 567, in which he says "by solemn treaty, free colored inhabitants of Louisiana have been admitted to citizenship of the United States."

Opinion of Attorney General Legaree, March 15th, 1843, Book of Opinions, vol. 4, p. 147.

The opinion of Att'y Gen. Wirt, vol. 1, p. 506, is not in conflict with this, being confined to free negroes of Virginia.

We therefore submit as a plain proposition, that the averment in the plea, that defendants are "free colored persons of African descent" may all be true, and yet complainant's allegation that they are citizens of Louisiana, *may be true*, and if so, the plea is bad and should be overruled.

V.

JOHN SLIDELL, WM. CREPPEL, JOHN DIAMOND, ISABELLA JENKINS, THE CITY OF NEW ORLEANS, H. E. LAMEYER, AND F. D. DE LA CROIX.

As the case of these remaining seven defendants are to be decided upon the same pleadings, and the same testimony, and the issues raised in each are identical, except that De La Croix has slaves instead of land, (which will be noticed separately,) we shall consider them together in one brief.

Our first proposition is this:

That inasmuch as the case of these seven defendants is presented by the same pleadings, and supported by identically the same testimony as the case of Gaines vs. Hennen, 24 How. 555, that that decision, most elaborately and carefully rendered by this court, upon full and able argument of distinguished counsel, in the absence of fraud and collusion, is a decisive authority that complainant is entitled to the same decree and relief against each of these defendants, as given her against Hennen, which was the full relief prayed for in her bill.

As that case has so important a bearing upon the decision of this case, and is so much relied upon by complainant, we give an abstract of the

POINTS DECIDED IN GAINES VS. HENNEN, 24 HOW. P. 553.

1st. That the probate of the will of Daniel Clark, of 1813, by the Supreme Court of Louisiana, in 1856, is affirmed as according to the law of Louisiana, and in accordance with the law that governs this court. Pages 557-562.

2d. That the bill presents a case of equity jurisdiction for this court, and that the Second District Court of New Orleans have not exclusive cognizance of the case. Page 565.

3d. That Chew, Relf, and Mary Clark, or their heirs, are not necessary parties to the bill. Page 565.

4th. That it was not necessary to set out in the bill,

the sources of Daniel Clark's title to the property, except as mentioned in the bill. Page 566.

5th. That the Probate Court of New Orleans have not exclusive cognizance of the case, because of the pendency of those proceedings therein at the time of filing the bill. Page 565.

6th. That the probate of the will of 1813, by the Supreme Court of Louisiana, in 1856, was a *recalling* and *annulling* of the probate of the will of 1811, made by the Probate Court of New Orleans, in 1813, and that this is the meaning of the court in Gaines vs. Relf et als. 12 How. 651, and 2 How. 647. Pages 566-7.

7th. That the testimony and admissions in the pleadings in the Hennen case *disprove* the plea of "purchase for a valuable consideration without notice." Page 567.

8th. That the estate of Daniel Clark was not a *vacant* succession. Page 568.

9th. That upon the testimony and admissions in the answers of defendants, *prescription* was interrupted 28th July, 1836, and that the *plea of prescription* was not supported by Hennen's answer and evidence. Page 568.

10th. That after the interruption of prescription by the bill of July 28th, 1836, the purchaser was a *possessor in bad faith.* Page 568.

11th. That the power of attorney of Mary Clark, to Relf and Chew, was invalid, and did not authorize

them to sell Clark's estate without the permission of the Court of Probates, which was not obtained.

Page 569-70.

12th. That the payment by Relf and Chew, of debts of Clark's estate, without the order of court, and without vouchers, is no proof of the existence of these debts.

Page 571.

13th. That the decision of this court in Gaines vs. Relf and Chew, 12 How. 506, was not *res adjudicata*, as to the status of complainant, or as to her rights of property. Page 571-80.

14th. That the *ecclesiastical record*, so called, is not admissible in evidence. Page 580.

15th. That complainant's *status* is not that of adulterous illegitimacy. Page 590.

16th. That Mrs. Gaines is the legitimate child of Daniel Clark *by law*, as the offspring of a *putative marriage*. Pages 594-614.

17th. That upon the pleadings and evidence under the law of Louisiana, Mrs Gaines is entitled to a *legal filiation as the child of Daniel Clark and Maria Julia Carriere, begotten in lawful wedlock*, and his universal legatee, and entitled to her father's succession, subject to the payment of legacies, etc. Page 614.

That the evidence in Gaines vs. Hennen, is identically the same as in the case of each of these defendants will appear without reading the eight or nine thousand

printed pages of the record, from the following stipulations and admissions therein:

1st. By agreement the evidence in the present records was taken in the case of De La Croix, (No. 81,) and was held to be taken *as to all the other defendants, and agreed to be offered by each defendant.*

Stipulation filed Oct. 22d, 1857, (Lizardi's Record, vol. 1, p. 85,) as follows:

STIPULATION, FILED OCT. 22d, 1857.

Circuit Court of the United States, Eastern District of Louisiana, in chancery.

MYRA C. GAINES
vs.
CITY OF NEW ORLEANS ET AL.
AND
MYRA C. GAINES
vs.
M. J. LIZARDI ET AL.
Nos 2695 and 2734.

It is hereby stipulated that the testimony taken and to be taken in the case of Myra C. Gaines vs. F. D. De La Croix, No. 2619, on the docket of this court, shall be deemed and held to have been taken in these cases, within the time for taking testimony prescribed by the rules of the court in chancery causes, and shall be offered by the party taking the same, subject to the same objections as have been or may be made to the same, in the cause in which it was actually taken; and it is furthermore stipulated that the agreement entered into in said cause of Myra C. Gaines vs. F. D. De La Croix No. 2619, as to the time of taking testimony, shall be held as extending to these above entitled causes. This agreement is not to preclude the parties from taking testimony in either case which they, or either of them, may consider as necessary to form the proper defence

of their interests respectively, independent of their co-defendants.

Provided the testimony be closed by the 1st Monday in November next.

New Orleans, July 21, 1857.

(Signed) F. PERIN, for comp't.

DUNCAN & McCONNELL,
For Defendants.

2d. The cases of Gaines vs. De La Croix, No. 81, and Gaines vs. the City of New Orleans et als., No. 82, were submitted together and upon the same evidence.

See agreement and submission of Dec. 12th, 1857, (City of N. O. Record, vol. 1, p. 76,) as follows:

New Orleans, Saturday, 12th Dec., 1857.

Court met pursuant to adjournment. Present, Hon. Theod. H. McCaleb, District Judge; absent, Hon. J. A. Campbell, presiding Judge.

Myra Clark Gaines
vs.
F. D. De La Croix. } 2,619.

Myra Clark Gaines
vs.
City of New Orleans et al. } 2,695.

These causes having been assigned for this day were, by agreement of counsel, taken up to be tried together, Messrs. Smiley, Randolph, Bonford and Perin appearing for the complainant, and Messrs. Duncan and McConnell for the defendants. Whereupon, the complainant offered in evidence the depositions and documents offered and filed by them before the commissioners, R. M. Lusher and J. W. Gurley, with certain exceptions, of which they stipulate to furnish a detailed list. The defendants offered in evidence the depositions and documents offered and filed by them before the said com-

missioners. The reading of the pleadings and the evidence was commenced and proceeded with until 3 o'clock, P. M., and it was then ordered that the causes be continued until Monday next at 10 o'clock.

3d. The case of Hennen was submitted upon the same evidence by complainant and defendant as that of Gaines vs. the City of New Orleans et als., No. 82. See agreement of Nov. 29th, 1858, Record, vol. 1, p. 88, as follows:

Agreement as to submission of cause, filed 29th Nov., 1858:

Circuit Court of the United States, Fifth Circuit and Eastern District of Louisiana, in chancery.

Myra Clark Gaines,
vs.
Manuel J. Lizardi et al. } No. 2,734.

It is hereby agreed, that so far as this case relates to Duncan N. Hennen, one of the defendants herein, it be now submitted to the court upon the following terms:

1st. Complainant offers in evidence *all the testimony, documents, letters, papers*, etc., etc., (with the exception of the bill and answer,) *that were offered by him in the case of complainant against the City of New Orleans et al.*, No. 2,695, on the equity side of this court.

2d. Defendant offers *all the testimony, documents, letters, papers*, etc. etc., (except the bill and answer) *that were offered by the defendants in said suit*, No. 2,695.

3d. That the complainant herein adopts the objections to evidence, and the motion to suppress that were made in her behalf in said suit No. 2,695, and insists upon the same as if nowhere made in the present case.

4th. Defendant adopts the objections to evidence and the motions to suppress that were made on behalf

of the defendants in said suit, No. 2,695, and will insist on the same as if nowhere made in the case.

(Signed,) F. PERIN,
for Complainant.

5th. And finally, complainant and defendant submit the case so far as concerns said Duncan N. Hennen, to the decision of the court, *nunc pro tunc.*, as if the same had been heard, tried and submitted at the same time as the aforesaid case of complainant vs. City of New Orleans et al., No. 2,695, and as if said Hennen had been party to said suit, No. 2695, and to the trial thereof; complainants and defendants to this suit claiming to all intents and purposes the right, benefits and advantages belonging to either parties to said suit No. 2,695, the same interest as if said proceedings had taken place in the suit without any exception whatever.

(Signed) DUNCAN N. HENNEN.

The complainant, by counsel, objects to the titles under which defendant holds the property in controversy, and moves that the same be suppressed, on the grounds urged against the title of the defendants in said suit No. 2695.

(Signed) F. PERIN,
for Complainant.

4th. The cases of Slidell, Diamond, Creppel and Senecal (Jenkins) were submitted upon the same evidence as the cases of the City of New Orleans et al., and De La Croix as appears by the following stipulation of Dec. 19th, 1860.

Memorandum of evidence offered on trial—filed 19th December, 1860.

MYRA CLARK GAINES
vs. } No. 2,734.
M. J. LIZARDI et al.

On answers of Owen Keating, John Diamond, E. P.

Senecal, Wm. Crippel, Jno. J. Slidell, N. Fitzsimmonds. —Evidence offered on trial 17th Dec., 1860.

The complainant offers:

1. All the exhibits to her bills, and all the evidence and testimony which was offered by her in cases Nos. 2,619 and 2,695 of the docket as per stipulation filed in those cases on 22d October, 1857, and marked by the clerk A B, J. W. G.

Defendants offer:

1. All the exhibits referred to in the several answers of the defendants, and all the evidence and testimony which was offered by the defendants in the two cases Nos. 2,619 and 2,695 of the docket, as per stipulation filed in those cases on 22d October 1857, and marked by the clerk A, B, J. W. G.

Defendant also offers the said stipulation and all others filed in the said cases.

And it is agreed, as per said stipulation, that the motion to suppress made in those cases by both complainant and defendants shall be deemed and considered as having been made in this case, and the rulings of the court on said motions shall be taken and considered as having been made in this case.

JAS. McCONNELL, for Defendants.
P. E. BONFORD, Sol. for Compl't.

The result of these agreements is that the case of Gaines vs. Hennen, 24 How. p. 553, was decided upon the same evidence as that which is in the present case of the City of New Orleans and Lameyer, and the evidence in that case is the same as in the case of De La Croix, and the testimony taken and offered in De La Croix case, is the same that is before the Court as to all the present defendants; in short, the testimony in the

Hennen case and in the case of these defendants is the same.

This will also appear from the Record in these cases.

That the pleadings and issue in the case of Gaines vs. Hennen are the same as in the present cases vs. De Lacroix, No. 81, vs. the City of New Orleans and Lamayer, No. 82, and vs. Lizardi et als. No. 83, which includes all these defendants, will appear as follows:

1st. The original Bill in each case (Record of each case, vol. 1, p. 1,) is the same, except dates and nature of property.

(*a.*) The Hennen bill is the identical bill in Lizardi et als., No. 83, which includes Crippel, Slidell, Diamond and Seneschal.

(*b.*) The De La Croix bill and the City of New Orleans et al. bill are the same as the Lizardi bill, as will be seen by an examination of each bill. They were drawn by the same solicitor and evidently copied the one from the other, with immaterial changes of date and property.

2d. The general answer of defendant in Gaines vs. Hennen is the same as the general answer of each of the present defendants.

(*a.*) Hennen in his answer (Lizardi Rec., vol. 1, p. 10,) adopts and makes his own, the answer of three

of these defendants (being all now before the court) to-wit: Crippel, Diamond and Senecal (Jenkins) as follows:

That he has taken full and perfect cognizance of the joint and several answers herein filed on the first of June, 1857, by certain defendants to this said above entitled cause, by Owen Keating, John Diamond, E. P. Senecal and William Crippel, and under the provisions of the said stipulation, he now refers to the same, and makes himself one of the respondents in said answer to all intents and purposes, to the same manner and to the same intent as if he had originally joined therein; and he makes all of the statements in said general answer his own, whether the same be made in the form of a general objection to the claim of complainant as stated in the bill of complaint and response to the averments therein contained, or a statement of facts in bar or avoidance of the same, and sets the same forth as an ample and sufficient answer to the said bill of complaint of her, the said complainant.

(*b.*) Slidell, in his answer (Lizardi Rec., vol. 1, p. 956,) adopts and makes his own the answer of the same three defendants.

Thus the general answer of all the defendants now before the court, in Gaines vs. Lizardi, Record, vol. 1 p. 17, to-wit: Slidell, Crippel, Diamond and Senecal, is identical with Hennen's answer.

(*c.*) The answer of Crippel, Diamond and Senecal (Jenkins) adopted by Hennen and Slidell, adopts and makes their own the answer of De La Croix, (Lizardi Record, vol. 1, p. 81,) so that Hennen, Slidell, Creppel, Diamond, Senecal (Jenkins) and De La Croix have the same answer.

(*d.*) The answer of the City of New Orleans and Lameyer (Record, vol. 1, p. 65) adopts and makes their own the answer of De La Croix; so that all the present defendants make the same answer as Hennen.

(*e.*) This will still more clearly appear from the defences set up in the answer of each defendant hereafter noticed.

(*f.*) The general answer sets forth all the materia facts, except the derivation of title peculiar to each, which is set forth in the individual answer of each. But that those facts in regard to title in the case of Hennen are the same as in the case of each of these defendants, will appear from the following chain of title both of Hennen and each of the other defendants, taken from the answer of each, which is as follows:

The only materiality of this chain of title to the present point (to-wit: to bring all defendants within the Hennen decision) is to show the same title from Daniel Clark, and that prescription was interrupted by citation (in addition to the admission in their general answer).

From this chain of title it appears that Slidell and Creppel's prescription was interrupted precisely as Hennen's was, by deriving title from the Carrollton Rail Road after they were made parties to the bill of 1836, and cited. (See demurrer of Relf and Chew, joined in by Carrollton Rail Road. Record, vol 1, page 346.)

Diamond's prescription was interrupted in the same way by deriving title from John Minturn, who was made a party to the original bill of 1836, and cited. (See same demurrer.)

Seneschal's (Jenkins) prescription was interrupted in the same way by deriving title from widow Ambrosie, who was a party to original bill of 1836, and cited. See answer of widow Ambrosie. (Lizardi Record, vol. 2, p. 84.)

The City of New Orleans' prescription was interrupted by being party to bill of 1836, and being cited. (See Record, vol. 1, p. 256.)

Lameyer's prescription was interrupted by deriving title from Petitpain, who was a party to the bill of 1836, and cited, (Record, vol. 1, p. 252,) and by his petition to become a party to the suit. (Record, vol. 1, p. 493.)

De La Croix was a party to the bill of 1836, and cited. (Record, vol. 1, p. 265.)

We have thus shown in the case of Slidell, Creppel, Diamond, Jenkins, City of New Orleans, Lameyer and De La Croix, that the pleadings, the issues, and the evidence, are the same as in Gaines vs. Hennen, 24 Howard, p. 553. We therefore confidently invoke the decision in that case as authority conclusive and decisive of the case of these defendants.

This court ought not to be called upon to again investigate the eight thousand printed pages of pleadings and evidence contained in these records, which have been once most ably and elaborately argued before this court by eminent counsel, and most thoroughly and critically analyzed by this court, in one of the most elaborate and carefully considered opinions among its reported decisions.

Whenever the same facts and issues come before this court which have been once fairly decided, it is in accordance with the uniform practice of this court, not to consider them as an open question, except in case of "clear mistake or evident error."

This rule is distinctly enunciated in Goodtitle vs. Kibbe, 9 How. 478. The questions involved in that case had been before the court in Pollard vs. Hagan, 3 How. 212, where the parties were entirely different, but the questions were the same. The court say:

The question decided in the State court cannot be regarded as an open one. The same question upon the

same Act of Congress and patent was brought before this court in the case of Pollard vs. Hagan, at January term, 1845, reported in 3 Howard, 212. That case was fully and deliberately considered, as will appear by the report, and the court then decided that the Act of Congress and patent conveyed no title. The decision of the Supreme Court of Alabama, from which this case has been brought by writ of error, conforms to the opinion of this court in the case of Pollard vs. Hagan. And it must be a very strong case indeed, and one where mistake and error has been evidently committed, to justify this court, after the lapse of five years, in reversing its own decision, thereby destroying rights of property which may have been purchased and paid for in the mean time, upon the faith and confidence reposed in the judgment of this court.

In the recent case of Wright et als. vs. Sill, 2 Black, 544, the court takes still stronger grounds and say that a case repeatedly argued and decided by this court, *is no longer open for consideration.*

This rule applies in full force to the City of New Orleans. *She has once been fully and fairly heard upon all the matters at issue in the present case.*

When the case of Gaines vs. Hennen was before this court, at the Dec. Term, 1860, the defendant and complainant invited the City of New Orleans, who was deeply interested in the questions at issue, to take part in the defense of that case. With the assent of the court, the City of New Orleans did defend that case. By a resolution of the City Council, she employed Louis Janin, an eminent attorney of that city, to defend her interests therein. He filed an able brief, which is now

among the records of that case. The court heard his defense and *passed upon the points raised by the city.* The court, in their opinion, say, p. 571 :

"We will now proceed to the consideration of that point made in the argument by the counsel of the defendant; but more particularly representing the City of New Orleans, as he said he did." "We will now examine the case upon the more serious points made in opposition to Mrs. Gaines by the learned counsel, Mr. Janin." P. 567.

Upon the eighth page of Mr. Janin's brief, filed in that case, after quoting from Hennen's brief, as follows :

"After an ineffectual effort to induce the City of New Orleans, (a defendant,) or its warrantor, the Carrollton Bank, (to both of whom the defense and entire management of the case, in this Honorable Court, was offered,) to assume the responsibility of the argument of a cause of such vast importance, he (Janin) then proceeds to use the following language :

"The City of New Orleans was also sued by the complainant for property of considerable value, and had obtained a decree, from which the complainant did not think proper to pursue an appeal. But the city being interested in the question involved in this suit, and finding herself authorized by the brief of the defendant, and its communication to this Honorable Court, to undertake the argument of this case, employed the undersigned counsel for this purpose.

"Under these circumstances, the undersigned counsel, while really appearing for the City of New Orleans, has to make use of Mr. Hennen's name and to take the record as Mr. Hennen made it. And while carefully examining that record, he finds that it contains most abundant means for sustaining a successful defense against the complainant."

Under these circumstances we say that the decision

CHAIN OF TITLE.

August 16th, 1813—Title in Daniel Clark.

August 17th, 1813—Will of 1811 admitted to Probate.

August 27th, 1813—Richard Relf appointed Test. Executor.

Jan'y 21st, 1814—Beverly Chew appointed Test. Executor.

Hennen's Title.	Slidell's Title.	Creppel's Title.	Diamond's Title.	Seneschal's Title. (JENKINS.)	City of N. O. Title.	Lameyer's Title.	De La Croix Title.
Dec. 28th, 1820. Relf and Chew, as Test. Ex. and as Atty. of Mary Clark at Auction, sold to Lavigne.	Dec. 28th, 1820, Relf and Chew, as Test. Ex. and as Atty. of Mary Clark, at auction, sold to Lavigne.	Dec. 28th, 1820, Relf and Chew. as Test. Ex. and as Atty. of Mary Clark, at auction, sold to Lavigne.	Relf and Chew, as Test. Ex. and Atty. of Mary Clark, at auction, sold, Jan. 5th, 1821, to Bonseigneur.	Relf and Chew, as Test. Ex. and Atty. of Mary Clark, at auction, sold, Jan. 5th, 1821, to Bonseigneur.	30th Oct., 1821. Relf and Chew as Attorneys of Mary Clark, sold at Auction to Everiste Blanc.	29th Dec., 1820. Relf and Chew, as Test. Ex. and as Atty. of Mary Clark, sold at auction to Debow.	16th Oct., 1813. Relf, as Test. Ex. sold at auction, to De La Croix, 23 slaves for $8,800.
Feb. 29th, 1829, Lavigne sold to Hiddleston.	Feb. 29th, 1829, Lavigne sold to Hiddleston.	Feb. 29th, 1829. Lavigne sold to Hiddleston.	4th Apr., 1833, Bonseigneur sold to Lambeth.	22d Dec., 1823, Bonseigneur sold to Mathew.	26th Sept., 1834. Everiste Blanc sold to the City of New Orleans.	7th Jan., 1824, Debow sold to Commagere.	
27th May, 1836, Hiddleston sold to Carrollton Railroad. *	27th May, 1836, Hiddleston sold to Carrollton Railroad. *	27th May, 1836. Hiddleston sold to Carrollton Railroad. *	18th March, 1836, Lambeth sold to John Minturn. *	28th March, 1831, Mathew sold to Cheval.	1836, City of New Orleans to Municipality No. 1 by law.*	18th April, 1827, Commagere sold to Oger.	
May 30th, 1844, Carrollton Railroad sold to D. N. Hennen, who held at time of suit, 1857.	May 30th, 1844, Carrollton Railroad sold to John Slidell, who held at time of suit, 1857.	May 30th, 1844, Carrollton Railroad sold to Boutin.	24th March, 1848, John Minturn sold to Benj. Rodriguez.	8th May, 1833, Cheval sold to Austin.	1848, Municipality No. 1, by law to City of New Orleans, who held at time of suit, 1857.*	25th May, 1833, Oger sold to Francis Petitpain.*	
* Cited as Deft. in the bill of 1836.	* Cited as deft. in bill of 1836.	12th June, 1846, Boutin sold to Grabriel.	10th Jan., 1854, Benja'n Rodriguez sold to John Diamond, who held it at time of suit, 1857.	16th June, 1835, Austin sold to J. A. B. Martin.	The City of New Orleans say that by operation of law in 1836, (no date), their title passed to Municipality No. 1, and then reverted back prior to 1857.	Sept. 30th, 1836, Petitpain sold to Lameyer, who held at time of suit, 1857.	11th Dec., 1813, Relf, as Test. Ex. and as Atty. of Mary Clark, sold to De La Croix at private sale 55 slaves for $21,200, which, with their increase, he held at time of suit, 1857.
		11th March, 1847, Grabriel sold to Creppel, who held at time of suit, 1857.	* Cited as deft. in bill of 1836.	30th March, 1836, Martin sold to Marie T. Moise, alias Wid. Ambrosie.*	* Cited as deft. in bill of 1836.	* Cited as deft. in bill of 1836.	* Cited as deft. in bill of 1836.
		* Cited as deft. in bill of 1836.		24th Jan. 1852, Wid. Ambrosie sold to Senechal, who held at time of suit, 1857. 1862, Seneschal to Jenkins by will.			
				* Cited as deft. in bill of 1836.			

CHAIN OF TITLE.

August 16th, 1813—Title in Daniel Clark.
August 17th, 1813—Will of 1811 admitted to Probate.
August 27th, 1813—Richard Relf appointed Test. Executor.
Jan'y 21st, 1814—Beverly Chew appointed Test. Executor.

Hennen's Title.	Slidell's Title.	Creppel's Title.	Diamond's Title.	Seneschal's Title. (Jenkins.)	City of N. O. Title.	Lameyer's Title.	De La Croix Title.
Dec. 28th, 1820. Relf and Chew, as Test. Ex. and as Atty. of Mary Clark at Auction, sold to Lavigne.	Dec. 28th, 1820, Relf and Chew, as Test. Ex. and as Atty. of Mary Clark, at auction, sold to Lavigne.	Dec. 28th, 1820, Relf and Chew. as Test. Ex. and as Atty. of Mary Clark, at auction, sold to Lavigne.	Relf and Chew, as Test. Ex. and Atty. of Mary Clark, at auction, sold, Jan. 5th, 1821, to Bonseigneur.	Relf and Chew, as Test. Ex. and Atty. of Mary Clark, at auction, sold, Jan. 5th, 1821, to Bonseigneur.	30th Oct., 1821. Relf and Chew as Attorneys of Mary Clark, sold at Auction to Everiste Blanc.	29th Dec., 1820. Relf and Chew, as Test. Ex. and as Atty. of Mary Clark, sold at auction to Debow.	16th Oct., 1813. Relf, as Test. Ex. sold at auction, to De La Croix, 23 slaves for $8,800.
Feb. 29th, 1829, Lavigne sold to Hiddleston.	Feb. 29th, 1829, Lavigne sold to Hiddleston.	Feb. 29th, 1829. Lavigne sold to Hiddleston.	4th Apr., 1833, Bonseigneur sold to Lambeth.	22d Dec., 1823, Bonseigneur sold to Mathew.	26th Sept., 1834. Everiste Blanc sold to the City of New Orleans.	7th Jan., 1824, Debow sold to Commagere.	
27th May, 1836, Hiddleston sold to Carrollton Railroad. *	27th May, 1836, Hiddleston sold to Carrollton Railroad. *	27th May, 1836. Hiddleston sold to Carrollton Railroad. *	18th March, 1836, Lambeth sold to John Minturn. *	28th March, 1831, Mathew sold to Cheval.	1836, City of New Orleans to Municipality No. 1 by law.*	18th April, 1827, Commagere sold to Oger.	
May 30th, 1844, Carrollton Railroad sold to D. N. Hennen, who held at time of suit, 1857.	May 30th, 1844, Carrollton Railroad sold to John Slidell, who held at time of suit, 1857.	May 30th, 1844, Carrollton Railroad sold to Boutin.	24th March, 1848, John Minturn sold to Benj. Rodriguez.	8th May, 1833, Cheval sold to Austin.	1848. Municipality No. 1, by law to City of New Orleans, who held at time of suit, 1857.*	25th May, 1833, Oger sold to Francis Petitpain.*	
* Cited as Deft. in the bill of 1836.	* Cited as deft. in bill of 1836.	12th June, 1846, Boutin sold to Grabriel.	10th Jan., 1854, Benja'n Rodriguez sold to John Diamond, who held it at time of suit, 1857.	16th June, 1835, Austin sold to J. A. B. Martin.	The City of New Orleans say that by operation of law in 1836, (no date), their title passed to Municipality No. 1, and then reverted back prior to 1857.	Sept. 30th, 1836, Petitpain sold to Lameyer, who held at time of suit, 1857.	11th Dec., 1813, Relf, as Test. Ex. and as Atty. of Mary Clark, sold to De La Croix at private sale 55 slaves for $21,-200, which, with their increase, he held at time of suit, 1857.
		11th March, 1847, Grabriel sold to Creppel, who held at time of suit, 1857.	* Cited as deft. in bill of 1836.	30th March, 1836, Martin sold to Marie T. Moise, alias Wid. Ambrosie.*	* Cited as deft. in bill of 1836.	* Cited as deft. in bill of 1836.	* Cited as deft. in bill of 1836.
		* Cited as deft. in bill of 1836.		24th Jan. 1852, Wid. Ambrosie sold to Senechal, who held at time of suit, 1857. 1862, Seneschal to Jenkins by will.			
				* Cited as deft. in bill of 1836.			

in Gaines vs. Hennen, is "*res judicata*" as to the City of New Orleans.

She is estopped from being heard in her defense to the present bill, *so far as the issues of fact and law are the same, as those decided in the Hennen case,* and there are none other.

We therefore respectfully submit, having shown that the issues of fact, of law, and of equity, and the evidence in support thereof, are identical in the case of each of these defendants, with that of Gaines vs. Hennen, that complainant, upon the authority of that case, is entitled to the relief and decrees prayed for in her bills.

VI.

But aside from the large amount involved in the decision of these cases now before the court, the judgment therein is of such vast importance in respect to nearly one thousand defendants, who are litigating with this complainant, questions substantially the same, in the Circuit Court of Louisiana, we beg leave to submit the following brief and argument, without relying upon the Hennen case, except so far as it is "*res judicata*" upon some points raised by these pleadings, to show that complainant is entitled to the decrees and relief as to the present defendants, that she has prayed for in her bill.

1st. The *status* of complainant is irrevocably fixed by the judgment in the Hennen case.

To these defendants, and to the whole world by that

decree, MYRA CLARK GAINES IS THE LEGITIMATE CHILD OF DANIEL CLARK AND MARIA JULIA CARRIERE, BEGOTTEN IN LAWFUL WEDLOCK.

"*Our judgment is that by the law of Louisiana, Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Maria Julia Carriere, begotten in lawful wedlock.*" 24 How. 614.

This question of status is no longer an open question. That an adjudication in a real contest upon the status of a party to that contest, is "*res adjudicata*," and cannot be contested again, is well settled by Roman law, by French law, by the common law, and by that peculiar law, the civil law of Louisiana.

Ingenuum accipare debemus eum, de que sententia lata est, quamois fuelit libertinus, quia res judicata pro veritate habetur, says Ulpian Dig., Lib. 1, Tit. 5, de Statu Hominem, law 25.

Toullier, the celebrated commentator upon French Law, in the chapter in which he treats of the authority of *res adjudicata*, speaks at length of the effect of judgments, on a question of status. In vol. 10, No. 216, he says:

(TRANSLATION.)

In the Roman Law, no exception is to be found to the rule, that the object demanded must be the same, in order to give rise to the defense of *res judicata* to a second demand; but there is an important exception to the rule that the second demand must be between the same parties. This exception, which also exists in our French law, and which is founded upon important reasons of public order and interest, relates to cases involving questions of status, which are called *prae judicia*,

actiones præjudiciales. * * * * They are so called because they decide before all other actions which may depend upon them, and may arise on the same subject, between whatsoever persons, and the effect at which they aim; the effect, which is peculiarly their own, is to prejudge all the others—that is, to decide beforehand, even before they have arisen.

These actions are those which concern the status of persons, and which we generally call questions d'état. Among them are those relating to family connexions, viz: Is he legitimate or a bastard, born from such a father and such a mother? Were such and such persons legitimately married, or not?—No. 217.

The questions which concern the status of men, are of such importance that they cannot be allowed to remain uncertain. When once they are brought before the courts, the judgment which is rendered fixes them irrevocably, provided the suit be conducted contradictorily, with a serious opponent; (*contradicteur legitime.*) It becomes a law for society.

The same rule exists at Common law. Greenleaf Ev., (vol. 1, §524, 525,) says:

"An apparent exception to this rule as to the identity of the parties, is allowed in the cases usualyl termed proceedings in rem, which include not only judgment of condemnation, of property forfeited, as a prize in the exchequer or admiralty, but also the decisions of other courts, directly, upon the personal status or relations of the party, such as *marriage*, divorce, *bastardy*, settlement, and the like. These decisions are binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others; partly upon the ground that in most cases of this kind, and especially in questions upon property seized and proceeded against, every one who can possibly be affected by the decisions, has a right to appear and assert his own rights, by becoming an actual party to the proceedings; and part-

ly upon the more general ground of public policy and convenience, it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined, and conclusively settled and at rest.

Lord Coke, in 1 Inst. 352 b, rule 9, says:

"Where the record of the estoppel doth run to the disabilitie or legitimation of the person, there all strangers shall take benefit of that record, as outlawrie, excommenyment, profession, attainder of premunire, of felony, etc., bastardie muliertie, and shall conclude the party, though they be strangers to the record."

"The general rule is that such a judgment, (of status,) sentence or decree, provided it be final, in the court in which it was pronounced, is evidence against all the world, unless it can be impeached on the ground of fraud or collusion."

Starkie Ev., 8 Am. Ed., p. 372.

Taylor Ev., sec. 1489, vol. 2.

Perry vs. Meadowcroft, 10 Beav. 122.

Dacosta vs. Villa Real, 2 Strange, 961.

Ennis et al. vs. Smith et al. 14th How. 400.

Smith's Leading Cases, H. & W., notes, p. 670, 661, 827, 836, vol 2.

Burge Commentaries, vol. I, p. 90-92.

The same principles are recognized in the jurisprudence of Louisiana. In Johnson vs. Weld, 8 Ann. 126, the late Chief Justice Eustis discussed at great length the principles regulating the plea of *res judicata*, and says:

"These conditions of the *res judicata*, in order to establish the ends of justice, have been viewed in the ju-

risprudence of the civil law, in the light most favorable to obtain it. The effect of the *res judicata* is consequently held to extend to the successors of the *Ayans cause*, the assigns of the parties, and to all those who claim through them. *In questions relating to the status of persons*, to servitudes and indivisible rights, the law, from necessity, has created exceptions to the general rule, where the suit has been publicly tried, and the judgment is without collusion."

2d. Daniel Clark, by his last will of 1813, left to complainant his entire estate, as appears by the following clause therein:

"Second. I do hereby acknowledge that my beloved daughter, Myra, who is now living in the family of Samuel B. Davis, is my legitimate and only daughter, and that I leave and bequeath unto her, the said Myra, all the estate, whether real or personal, of which I may die possessed, subject only to the payment of certain legacies hereinafter made."

Exhibit A, Record, p. 7, vol. 1.

That he left this last will is proved by the judgment of the Supreme Court of Louisiana admitting to probate the will of Daniel Clark of 1813.

Succession of Clark, 11 An. p 124.

It is also proved by the probate of the will of 1813 being alleged in the bill, and not denied by defendants in their answer. (See bill and answers of defendants.) They do not deny the *fact* of probate, but question the effect of that probate.

3d. One effect of the probate of the will of 1813 by the Supreme Court of Louisiana in 1856, (11 Ann., p. 124) is to recall and annul the probate of the will of

1811 probated in 1813, so far as its provisions are inconsistent therewith.

24 How. 555.

"When a court recalls a probate of a will, substituting a probate of another will by the same testator made posterior to the first, that the former becomes inoperative, and that the second is that under which the estate is to be administered without any formal declaration by the court that the first was annulled, and it makes no difference that part of the estate was administered under the first probate."

A subsequent will can be probated without any order of the court annulling a previous probate, and whether it revokes the previous will or not depends upon the terms of the will itself. This revocation may be express, as in C. C. 1684, or tacit by inconsistent provisions, as in C. C. 1686.

Sarce et al. vs. Dunoyer, Ex., 11 La. 220.
Tounier vs. Tounier, 12 La. 24.
Succession of Bowles, 3 Rob. 31.
Lyon vs. Fisk, 1 Ann. 444.

Another effect is this:

The probate of the will of 1813 is a judgment of the Supreme Court of Louisiana binding upon all parties litigant, while it remains unrevoked and unannulled, and cannot be attacked collaterally in this court.

"The courts of the United States have no probate jurisdiction, and must receive the sentences of the courts to which the jurisdiction over testamentary matters is committed as conclusive of the validity and contents of a will."

If any error was committed in allowing the probate the remedy is in the State court."

Gaines vs. Relf et al., 2 How. 619.

Fouvergne et al. vs. City of N. O.,18 How. 473.

Tarver vs. Tarver, 9 Pet. 179.

The only question open in this court in the matter of proof of wills and kindred judgments is: Had the court jurisdiction over the subject matter?

If it had jurisdiction, then, right or wrong, that judgment is conclusive upon this court.

In Elliot vs. Piersal, 1 Pet. 338, the court say:

"Where a court has jurisdiction it has a right to decied evrey question which occurs in the cause, whether its decisions be correct or otherwise; its judgment, until reversed, is regarded as binding in every other court."

"It is well settled that when the jurisdiction of a court of limited and special authority appears upon the face of the proceedings, its action cannot be collaterally attacked for mere error or irregularity."

Comstock vs. Crawford, 3 Wal. 403.

"The sufficiency of proof upon which the court took its action is not a matter open to consideration in a collateral manner."

3 Wal. 403.

"The court having a right to decide every question which occurs in a cause, whether its decisions be correct or otherwise, its judgment until reversed is binding upon every other court."

Florentine vs. Barton, 2 Wal. 216.

The same doctrine is stated in Adams vs. Preston, 22 How. 488, in which the cases of Tarver vs. Tarver, 9

Pet. 174, Gaines vs. Chew, 2 How. 619, Fouvergne vs. City of N. O., 18 How. 471, are cited and approved.

See also

Gelston vs. Hoyt, 3 Whea. 316.
Armstrong vs. Lear, 12 Whea. 175.
Thompson vs. Tolmie, 2 Pet. 166.
Tompkins vs. Tompkins, 1 Story, 552.
Osgood vs. Breed, 12 Mass. 533.
Inh'ts Dublin vs. Chadbourne, 16 Mass. 441.
Laughton vs. Atkins, 1 Pick. 541.
Lewis' Heirs vs. His Executors, 5 La. 394.
Lalanne Heirs vs. Moreau, 13 La. 436.
Graham Heirs vs. Gibson, 14 La. 149.
Derbigny vs. Pierce, 18 La. 551.
Box vs. Lawrence, 14 Texas 545.
9 Petersdorf, 202.
12 Vesey, jr., 298.
Gresley Eq. Ev. 334–8.
Smith's Leading Cases, Vol. 2, p. 828.
(H. and W. notes.)

From these three propositions it necessarily results that the *law of these cases* is that complainant is the only legitimate child of Daniel Clark, and sole legatee of all his estate by virtue of his last will, the probate of which, being unrecalled, is binding and conclusive upon all these defendants.

The next inquiry is, whether the property claimed by complainant in her bill, and admitted by defendants

in their answer to be in their possession, is a part of the estate of Daniel Clark, left at his decease and devised to complainant in his last will.

1st. The City of New Orleans, by their answer under oath to the complainant's special interrogatories, admit that the property claimed by them is a part of the succession of Daniel Clark. Chas. M. Waterman, mayor, who signed and swore to the answer of the City of New Orleans, says "that he believes that property did belong to the succession of Daniel Clark, and that at the time of his death he was seized thereof."

See Ans. Vol. 1, p. 69.

2nd. H. E. Lameyer says, in answer to complainant's special interrogatories (vol. 1, p. 68), that the property "claimed by him was a part and portion of the estate of Daniel Clark at the time of his decease."

3rd. John Diamond, in his separate answer (vol. 1, p. 31), says under oath "that the title to the above described property, claimed and owned by him, was in Daniel Clark, before and at the time of his, the said Daniel Clark's, death."

4th. De La Croix does not deny that Daniel Clark was the owner, at the time of his death, of the slaves which he claims, and therefore admits it, it being distinctly alleged in complainant's bill that the slaves he claims were a part of Daniel Clark's succession; and, besides, he claims to have bought them of the succession, which tacitly admits the bill to be in Clark's estate.

De La Croix Ans. Vol. 1, p. 13.

5th. Creppel, Slidell and Seneschal (Jenkins) each, by their answer, admit that the legal title to the land claimed by them, stood in the name of Daniel Clark at the time of his death in 1813.

Vol. 1, p. 36, 33, 937.

The case then of complainant is that of an only "legitimate child," whose status is irrevocably fixed as such by judicial decree, claiming property as universal legatee under her father's last will, duly probated and the probate unrecalled and in full force, not open to contest, against certain defendants who admit the possession of said property, and admit that the legal title to the property belonged the testator's succession.

Upon such a case presented by complainant, we respectfully submit that she is clearly entitled to the equitable relief sought from her bills against each of these defendants, unless prevented by some one or more of the various pleas, answers and proofs set up in defence by each one of these defendants.

We will, therefore, proceed to demonstrate clearly and beyond all reasonable doubt, as we believe, the entire invalidity and insufficiency of each one of the defences set up by each one of these defendants in bar of complainant's legal and equitable rights to her father's succession.

VII.

In opposition to this apparently plain case of complainant, each of these defendants, by their pleadings,

set up various defences which, all being the same, are found in the sixty-five printed pages of the answer of Creppel and others (Lizardi Record, vol. 1, p. 17); which answer contains more multifariousness, incongruity, duplicity, inconsistency and irrelevancy in pleading, and more bad facts, bad law, and bad equity than can be found in the record of any chancery suit in this or any other Court.

We have carefully analyzed the answer of each, and the following will be found to be the various defences in the bill:

They set up several mere formal objections, which have been distinctly overruled in complainant's former suits, or their invalidity is apparent upon the mere statement of them.

The formal objections are as follows, with the answer to them:

1st. That complainant has not set forth any equity in her bill that entitles her to a discovery or relief. P. 19.

2nd. That Richard Relf, Beverly Chew and Mary Clark, or their representatives, are necessary parties to the bill. P. 19.

3rd. That the title papers of Daniel Clark to the property in question, are not disclosed by the bill. P. 20.

4th. That the Second District Court of New Orleans (Probate Court) has exclusive jurisdiction of the matters of this bill and the will of Daniel Clark. P. 20, 21.

These four objections are distinctly overruled in Gaines vs. Relf and Chew, 6 How. 550, and Gaines vs. Hennen, 24 How. 555.

5th. That complainant has a plain and adequate remedy atl aw.

This objection is in terms overruled in complainant's case in 2 How. 619, 6 How. 550, and 24 How. 555.

6th. That complainant has not displayed good taste in her allegations, which are scandalous, etc.

P. 74.

That objection should have been referred to a master for report.

We will now notice what defendants claim to be the real defences to the bills of complaint.

VIII.

FIRST DEFENCE.

They claim, as a question of proof from the record, that the status of complainant is that of an illegitimate child, adulterous bastard of Daniel Clark, and therefore can-an not take this estate from Daniel Clark, either as heir or legatee, under the will of 1813.

This defence is made in the answer of each.

Lizardi R., vol. 1, p. 74, 75, 76.
De La Croix R., vol. 1, p. 48, 49, 50.
City of N. O. R., vol. 1, p. 58, 59, 60.

During thirty years of litigation this has been the great defence to complainant's claim. Three-fourths of this voluminous record is devoted to that alone.

The answer to this defence is simple but conclusive.

The question of complainant's status is not an open question to these defendants in these cases.

To them and to the whole world her status is irrevo-

cably fixed by the decree of this Court in the Hennen case.

It is "*that, by the law of Louisiana, Mrs. Gaines is entitled to a legal filiation as the child of Daniel Clark and Maria Julia Carriere, begotten in lawful wedlock.*"

That such is her status, irrevocably fixed by the law governing this case, is conclusively shown in discussing this subject in this brief (Ante p. 51, 52), to which we refer.

But if the question of complainant's status was an open one to these defendants, there is one position to which we desire to call the attention of the Court, and which we deem perfectly conclusive upon the question of legitimacy. Even if the decision in Gaines vs. Relf et als., 12 How., has all the force that can be claimed for it by defendants, and even if the "Ecclesiastical record" is legal evidence in those cases, which it is not, COMPLAINANT IS THE LEGITIMATE CHILD OF DANIEL CLARK, BY THE LAW, AS THE OFFSPRING OF A PUTATIVE MARRIAGE.

Defendants say she is an adulterous bastard.

We say the question of adulterous bastardy is settled by the record in this case against defendants' position. At the time of complainant's birth, in 1805 or 1806, under the laws of Louisiana, an adulterous bastard was the child of a man and a woman who were not married together (legally or illegally), one or both of whom, at the conception of the child, being married to some other person.

The child of such parents was necessarily adulterous. But if such parents of the child were married (legally or illegally), then the child was legitimate or not, according to the good faith of one or both of the parents in contracting the marriage. If both parents were in good faith in contracting the marriage, then the offspring was the legitimate child of both parents, and could inherit from both. If only one of the parents was in good faith, then the offspring was the legitimate child of that parent only.

Thus a child might be adulterous *in fact*, but legitimate *in law*.

Old Code, p. 44, Tit. 7, Art. 5.
C. Code, Art. 201, 119, 120.
Burge Commentaries, vol. 1, p. 97.

The Louisiana decisions are conclusive upon this point.

Clendening vs. Clendening, 3 M. (N. S.) 438.
Patten vs. New Orleans et als., 1 Ann. 100.
Hubbell vs. Ikstein, 7 Ann. 252.
Abston vs. Abston, 15 Ann. 137.

Such also was the French law.

Code Napoleon, Book 1, Art. 201, 202.
Pothier Contrat du Marriage, Tome 6, p. 197.
Toullier, Tome 1, Tit. V, p. 541.
Marcadi Explication du Code, Tome 1, p. 520.

Such also was the Spanish law, which prevailed in Louisiana at the time of Clark's marriage.

"That by the act of marrying the second time whilst

the first wife was alive, the person who does so violates the faith due the marriage contract, that he deceives the second wife and wrongs the first, inverts the order of successions, and of the legitimacy established by the laws, inasmuch as his fraud makes the children of the second marriage *though truly adulterine, legitimate and capable to inherit from their parents on account of the good faith of their mother in contracting the marriage.*"

Novissima Recopilacion, vol. 5, 425, N. Ley. 10.

This position is distinctly decided, and this law of Louisiana cited and approved by this court in Gaines vs. Hennen, 24 Howard, p. 594, as follows :

" Now, we say, first, that the legal relations of adulterous bastardy do not arise in this case; for, independently of the declaration of the will, that the complainant is the legitimate child of Daniel Clark, this court having decided in 6th Howard that the marriage of Clark to Zulime was valid by reason of the invalidity of her previous marriage with Jerome Des Grange, that of course makes the complainant legitimate. But, if it be assumed, as it was in the argument, that by the decision in 12 Howard, that the marriage of Clark to Zulime was invalid on account of the validity of her marriage with Des Grange, then still Myra is legitimate *by the law*, as the offspring of a *putative marriage.*

The cases from the Louisiana reports are conclusive. The articles in the old Code, 119, 120, are to this effect, that if both parents, or either of them, contracted the marriage *in good faith the issue of it will be legitimate.* So it was ruled in the case of Clendening vs. Clendening, (3 New Series, 438.) The language of that case is, " that the plaintiff resists the claim on the succession of his father by a woman he married in the lifetime of his wife, the plaintiff's mother, and of the children, if born of that woman. The defendants contend that notwithstanding the plaintiff's father had a lawful wife at the time of his second marriage, that as the woman he last

married was in good faith at the time of the marriage, and ever since, at least till after the birth of the last child she had by him, her marriage has its civil effects; and that she and her children, the present defendants, are entitled to all the advantages the law gives to a lawful wife and children. There seems to be no dispute on the question of law. The woman who was deceived by a man who represents himself single, and the children begot while the deception lasted, are bona fide wife and children, and as such are entitled to all the rights of a legitimate wife and issue." The plaintiff then urged, that four of the children were born after the good faith of the woman ceased, as she had been advised of the illegality of her marriage by a communication made to her that her husband had another wife living in Tennessee. The court, however, said the proof of this knowledge was insufficient to deprive herself and children of their rights, though one witness swore he communicated that fact to her.

The next case came up before the new court organized in Louisiana under the constitution of 1845. It is that of Patton vs. The Cities of Philadelphia and New Orleans. 1 Ann. 100. The facts were, that in 1799 A. Morehouse married Abigail Townes in the State of New York, and had two children by her. He subsequently came to the Spanish colony of Louisiana, and gave out that he was a widower, and married Elenore Hook. In the act of marriage he declared himself the widower of Abigail Townes. By the second wife he had children, and both wives survived him. It was said, "the decision of the late Supreme Court in the case of Clendening vs. Clendening et al., 3 M. N. S., 438, in relation to the good faith of the second wife is a correct application of the Spanish law, which regulated the subject matter at the time of the marriage of the plaintiff's ancestor. By the law, 1 title, 13, part 4, it is ordained, that if, after both parties know with certainty the existence of the impediment to the marriage,

they beget children, these children will not be legitimate; yet, if during the existence of such impediment, and while *one or both of them* was ignorant of it, they should be accused before the judges of Holy Church, and before the impediment as proved in the sentence pronounced they should have children, those begotten during the existence of the doubt will all be legitimate. We agree with the plaintiff's counsel, that the second wife, and the children conceived during her good faith, have all the rights which a lawful marriage gives." In this case, also, it was that the second wife was informed of the existence of her husband's first wife, "but the court answered the evidence establishes nothing more than the existence of a doubt."

We now give the case of Olive Abston et als. vs. Rebecca Abston et als., decided in 1860, by the supreme court of Louisiana. Its ruling is coincident with the two previous cases cited, upon a statement of facts concurring with them, but more particular in detail.

Olive Abston sued to have herself recognized as the lawful surviving wife of John Abston, deceased, late of the parish of Carroll, claiming she was entitled to a portion of the property of his succession. Her son, John N. Abston, the issue of her marriage with John Abston, deceased, joined in the action, for the purpose of having himself recognized as the legitimate son and lawful heir to the estate of his deceased father. John N. Abston is the exact case of Mrs. Gaines. The suit is against Rebecca Wright, the third wife of John Abston, deceased, and the administrator of his succession or estate. He intervened in his capacity of tutor of Nancy Nix Abston, the minor child of the defendant. the issue of her marriage with the deceased, claiming in behalf of the minor the rights of legitimate and forced heir in the succession of John Abston, her father. Rebecca Wright pleads in general denial, and avers that she was lawfully married to John Abston, deceased, in Warren county, in the State of Mississippi, and that if

the plaintiffs alleged prior marriage was ever consecrated it was unknown to her, and to all other persons residing in the State of Mississippi. She filed, also, a supplemental answer, averring that her husband, John Abston, had made in the State of Mississippi his will, leaving to her his whole estate, after the payment of his debts, and that the will had been admitted to probate in the parish of Carroll in Louisiana.

The facts of the case were these: John Abston married with Olive Hart, his first wife, the plaintiff in this suit, in the State of Alabama. John N. Abston, the co-plaintiff in the suit, and other children, were the issue of that marriage. John Abston abandoned his family in the State of Alabama without having been divorced, a vinculo matrimonii, from his first wife, contracted a second marriage with one Susan Bell, and she died. After her death, and being still undivorced from his first wife, he intermarried in Mississippi with Rebecca Wright. In a short time after this last marriage he removed from Mississippi into Carroll county, in the State of Louisiana, where he acquired a new domicil, and where he died, in which was situated the whole property of his succession, movable and immovable, at the time of his death.

This narrative, and the relations as they have been given of the parties to the suit, raised two questions, which it became necessary for the court to decide before it gave its opinion upon the question of the legititimacy of the two sets of children of John Abston, the bigamist, and father of them, and the rights of his two wives in his estate: First, as to the effect of the probate of the will, it being contended, as that had been done by a court of competent jurisdiction, that it could not be questioned collaterally, nor its validity be inquired into in the suit. The court declared that the decree of a probate court ordering a will to be executed does not amount to a judgment binding on those who are not concerned in it, and that when the will is offered as the

title, in virtue of which property is claimed or withheld, that its validity may be inquired into. Sophie vs. Duplessies, 2 Annual, 724; Succession of Dupuy, 4 Annual, 570. The other question raised was, whether the rights of the parties in the suit should be determined by the law of Mississippi, where the marriage of the defendant and the deceased had been contracted, or by the law of Louisiana, where John Abston had his domicil at the time of his death, where his succession was opened, and where all his property was situated. The answer to that question was, that the laws of Louisiana which regulate the right of succession make no distinction between persons who have contracted marriage in or out of the State, nor the issue of such marriages, whether born in or out of the State. If they have the qualities required by law in matters of inheritance, they will be recognized as legal heirs without regard to the place of marriage or birth.

The court, then, with a proper regard to the fact that the will which had been made by John Abston WAS INVALID ON ACCOUNT OF ITS NOT HAVING BEEN ATTESTED BY THREE WITNESSES, AND THAT THE SUCCESSION WAS AN INTESTACY, determines that it could not be regulated by the law of Mississippi, as the plaintiff contended it should be, the basis of which is the common law, but that it must be by the law of Louisiana. We prefer to cite its own language as to the similitude and the differences between them: "The prior marriage of the deceased with the plaintiff, which remained undissolved, was a legal disability under the common law, which made the marriage with the defendant, Rebecca Wright, not merely voidable, but void ab initio, and made their issue illegitimate and incapable of succeeding by inheritance to the estate of any one. By the law of this State the disability of a prior marriage undissolved, also renders the second marriage null and void, BUT THE LEGAL CONSEQUENCES OF A MARRIAGE VOID AB INITIO UNDER OUR LAW, ARE VERY DIFFERENT FROM

THOSE UNDER THE COMMON LAW. The Civil Code declares that the marriage which has been null, nevertheless has its civil effects in respect to the parties and their children, IF IT HAS BEEN CONTRACTED IN GOOD FAITH. IF ONLY ONE OF THE PARTIES ACTED IN GOOD FAITH, THE MARRIAGE PRODUCES ITS CIVIL EFFEDTS ONLY IN HIS OR HER FAVOR, AND IN FAVOR OF THE CHILDREN BORN OF THE MARRIAGE." "In two cases, somewhat similar to the present, it has been held that each wife was entitled at the death of the husband to one-half, as the community property, after the payment of debts, and this rule will govern our decision in this case." Patten vs. Philadelphia, 1 Annual, 98; Hubbett vs. Inksleon, 7 Annual, 25. The mandate of the court was accordingly given, with this further decree, that John N. Abston, the co-plaintiff, and that *Nancy Nix Abston, the minor, represented by the intervenor*, are entitled as heirs-at-law to the separate property or estate of their deceased father, John Abston, and the costs of the appeal were directed to be paid, one-half by the plaintiff, Oliver Abston, and the other half by Rebecca Wright, the defendant.

Only two facts are essential to be proved to maintain this position.

1st. The factum of a marriage between complainant's father and mother.

2d. Good faith in Clark in contracting the marriage.

1st. Was Daniel Clark married to Zulime Carrierre at and before birth of complainant?

If this was a new question to be decided upon the evidence we should say that the testimony in this record of Madame Despeau and Calliveret, who were present at the marriage, and of Bellechase, Boisfon-

taine and Mrs. Smith, with the declaration in Clark's will of 1813, abundantly prove that fact.

But it is not a new question.

The Supreme Court of the United States have decided that there was a marriage between Clark and Zulime Carriere, in Philadelphia, in 1802 or 1803, in Gaines vs. Patterson, 6 Howard.

In that case the unanimous opinion of all the judges was that the evidence in that record proved the factum of a marriage between Clark and Zulime Carriere.

In the present case defendants have offered no new legal evidence bearing upon the factum of marriage which was not in the Patterson Record, while complainant presents the same evidence upon which that opinion was founded, and much that is new, especially the important fact of her father's acknowledgment of her legitimacy in his last will.

But defendants say the decision in Gaines vs. Patterson, 6 How., is overruled by Gaines vs. Relf et al., 12 How., as to the factum of Clark's marriage.

We say it is not, and as conclusive upon this point cite the langnage of this court in Gaines vs. Hennen, 24 Howard.

In speaking of the question whether the decision of Gaines vs. Patterson was overruled by the decision in 12 How., the court say:

The judgment in that case has never been overruled or impaired by this court. It certainly was not intended to be, by the case in 12 Howard, for the report in that case shows, from the number of the justices who

sat upon its trial, and their decision as to the judgment then to be rendered, that the majority of them did not intend to overrule the decree in 6 Howard. It was recognized again as still in force by a majority of the judges who sat in this case in our consultation.

It was not only not so; but one of the justices who assented to the judgment in 6 Howard, which declares that there had been a valid marriage between Daniel Clark and Zulime Carriere, and that she was the legitimate child of the marriage, would not assent to its being done when he concurred in the decree in 12 Howard.

The decision in 12 Howard does not, either in terms or inferentially, assert that no marriage had ever taken place between Daniel Clark and the complainant's mother.

Upon this question we deem the opinion of this court better authority than the mere assertion of defendants.

Besides, in Gaines vs. Relf et als., 12 How., Mr. Justice Catron, who delivered the opinion of the Court, distinctly stated that the Court deemed it *immaterial to the issue they were called upon to try whether Clark was married to Zulime Carriere or not*, and of course the Court did not intend to decide any immaterial issues.

But, however this may be, and whether the case of Gaines vs. Patterson, 6 How., was a real contest so as to be an authority, we cite the reasoning of the Court in that case upon the same facts as are in these cases, as conclusive that they prove one of the same things now that they did then, to-wit: THE FACTUM OF A MARRIAGE BETWEEN COMPLAINANT'S FATHER AND MOTHER.

2nd. Did Clark contract that marriage in good faith?

Upon this question, the fact of marriage being proved, the presumptions of law are all in favor of good faith.

This is the doctrine of Marcadi and other distinguished French writers.

To disprove the good faith of Clark, "the law requires that there shall be full proof to the contrary, and will not be satisfied with semi plena probatio."

Gaines vs. Hennen, 24 How.

Chief Justice Martin, in Clendening vs. Clendening, 3 M. (N. S.) 442, says to disprove the good faith in such cases, "THE PROOF MUST BE IRREFRAGIBLE."

There is no pretence but what Clark could contract this marriage, He was an unmarried man. Clark's good faith is proved by the testimony of Madame Despau and Calliveret, Mrs. Smyth, Boisfontaine and Col. Bellechasse.

Clark's acknowledgment of complainant as his legitimate child, in his last will, is almost conclusive upon this question.

By the Roman law, this testamentary recognition of a child's legitimacy was conclusive.

The 117 Nouvelle of Justinian declares :

"We have determined to ordain that if any one having a son or daughter of a free woman, with whom he might have been married, shall say in a written act, either before a public officer or under his own hand, sustained by three creditable witnesses, or in his last will, that this son or this daughter is his child, and that he does not call them natural children, they shall be re-

puted legitimate, and no other proof shall be demanded of them, and they shall enjoy the rights of legitimate children."

As Clark had no other legitimate issue, there is no one in existence who can contest Clark's acknowledgment of complainant's legitimacy.

Jobert vs. Pitot, Exrs., 4 Ann. 305.

As an authoritative conclusion, as to the good faith of Clark, upon the facts in these records, we cite the opinion of this Court upon this question in Gaines vs. Hennen, 24 How. p. 600, where it is expressly decided that Clark was in good faith when he married the mother of complainant.

IX.

SECOND DEFENCE.

They claim, as a question of law, that the decree of this Court in the case of Gaines vs. Relf et als., 12 How. p. 472, is *res judicata*, both as to complainant's present claim for the property, rents, revenues, etc., held by these defendants, and as to complainant's status.

Lizardi Record, vol. 1, p. 52–65.
De La Croix Record, vol. 1, p. 28–40.
City of N. O. Record, vol. 1, p. 35–49.

We have before clearly shown (Ante p. 47–61) that no question of the status of complainant is open to defendants in this case. It is closed until the decree in Gaines vs. Hennen is annulled.

But if that question were open, it is equally clear

that the decision in Gaines vs. Relf et als., 12 How., is *res judicata* as to the complainant's status.

This position is made so clear and plain by the *reasoning* of the Court upon this point, in Gaines vs. Hennen, that we quote that reasoning as a full and perfect answer to the objection.

But what was decided in the case in 12 Howard? It is stated, in the language of the decision, "that the first and most important of the issues presented is that of the legitimacy of Mrs. Gaines." Then are stated the pleadings under which the issue was made. It shall be given in the language of the decision: "She (Mrs. Gaines) alleges that her father, Daniel Clark, was married to Zulime Nee Carriere, in the city of Philadelphia, in the year 1802 or 1803, and that she is the legitimate and only legitimate offspring of that marriage. The defendants deny that Daniel Clark was married to Zulime at the time and placed alleged, or at any other time and place. And they further *aver* that at the time the marriage is alleged to have taken place, the said Zulime was the lawful wife of one Jerome Des Grange. If the mother of the complainant was the lawful wife of Jerome Des Grange at the time Zulime is alleged to have married with Clark, then the marriage is merely void, and it is immaterial whether it did or did not take place, and the first question we propose to examine is as to the fact whether Zulime was Des Grange's lawful wife in 1802 or 1803." Then follows the recital of the marriage between Des Grange and Zulime with the record of it, on the 2d December, 1794, admitted on the part of Mrs. Gaines. To rebut and overcome the established and admitted fact of that marriage, introduced witnesses to prove, "that previous to Des Grange's marriage with Zulime he had lawfully married another woman, who was living when he married Zulime, and was still his wife; and, therefore, the

second marriage was void, and this issue we are called on to try."

Then it is said that "the marriage with Des Grange having been proved, it was established as prima facie true that Zulime was not the lawful wife of Clark, and the onus of proving that Des Grange had a former wife living when he married Zulime was imposed on the complainant; she was bound to prove the affirmative fact that Des Grange had committed bigamy." Then follows the recital of the testimony of the complainant to prove that Des Grange became a bigamist by his marriage with her mother. And then to "meet and rebut this evidence, the defendants introduced from the records of the Cathedral church of the diocese, to which New Orleans belonged at that period, an ecclesiastical proceeding against Des Grange for bigamy, which respondents insist is the same to which complainants refer." It is set out in full in the decision, beginning at page 513 in 12 Howard, extending to 519 inclusive. Then the rebutting testimony of Daniel W. Coxe, for a long time a copartner in business with Clark, was introduced. He states an antecedent connection between Clark and Zulime to the time of their alleged marriage, with a confidential letter to him, which was delivered by Zulime, in which it was stated that she was pregnant, and that he, Clark, was the father of the child; further, requesting that he would put her under the care of a respectable physician, and furnish her with money during confinement, and stay in Philadelphia; and further, that she gave birth to a child, who was Caroline Barnes, who, before her marriage, went by the name of Caroline Clarke, and that what has been related happened in 1802; and he further states that Clark was not in Philadelphia in 1803, having gone to Europe in August, 1802, and having returned to New Orleans early in 1803. A letter from Des Grange was introduced, dated at Bordeaux, July, 1801; also a suit for alimony brought by Zulime against

Des Grange in 1806, which will be further noticed in the opinion. Then it is said: "This is substantially the evidence on both sides on which the question depends, *whether Des Grange was or was not guilty of bigamy* in marrying Maria Julia Nee Carriere in 1794. Objections are taken to several portions of this evidence, and especially as respects the record of the suit against Des Grange for bigamy in the ecclesiastical court." And though this is followed in the decision by a suggestive, able, and searching commentary upon the objections made to the testimony of the defendants, and upon that of the complainant, by connection and comparison of the two, and upon what was deemed the law of the case, all of it relates exclusively to disprove that Des Grange was married, and had a wife alive when he married Zulime.

The announced conclusions in that case, which were seven in number, 12 Howard, 539, show it to have been so. It was "the question decided," and was said "concludes this controversy." The factum of marriage between Clark and Zulime, and the legitimacy of Mrs. Gaines, as both had been decreed by this court, were not then disaffirmed, either directly or inferentially, and all that was said about it is, "that the decree of this court in Patterson's case does not affect the defendants, for two reasons: 1. Because they were no parties to it; and 2d, because it was no earnest controversy."

It is our opinion that the decision made in the case in 12 Howard, was not intended to reverse the decree in 6 Howard, and that it cannot be so applied as res judicata to the case we are now trying.

That the decision in 12 Howard is not res judicata, as to complainant's present claim for the property, etc., will appear equally clear upon an examination of the original bill and its amendments, upon which that decree was founded. The original bill, No. 122, is found in

Record, vol. 2, p. 1, and the amendments on p. 25, 65–147.

In that suit (12 How.) complainant claims one-half of this estate as vendee of her mother, being her community interest as the surviving wife of Daniel Clark, and four-fifths of the other half as forced heir of Daniel Clark.

In the present bill, she claims the estate as legatee under last will of Daniel Clark.

The Civil Code of Louisiana conclusively settles this question.

Article 2265.

"The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same. The demand must be founded on the same cause of action. The demand must be made between the same parties, and formed by them against each other in the same quality."

The fatal objection to defendants' plea is, that complainant's claim in 12 Howard and in the present bill is not founded on the same cause of action, nor is it formed by the parties against each other in the same quality.

Her cause of action, as donee of her mother's community interest in Daniel Clark's estate, is entirely different from her cause of action as devisee under the will of 1813.

Her quality as forced heir of Daniel Clark is not the same as legatee under his last will.

The Court in 12 Howard could not settle her rights under the will of 1813. They were not in issue. Her rights under that will did not then exist for want of a probate of that will, which took place four years after that decison.

The authorities are conclusive upon this point.

In Burt vs. Stansburg, 4 Cowen, 563, the Court say:

"The defendant might have shown, if he could, that he had acquired title since the former trial, or any other title other than that which had been passed upon in the former trial."

See also

Jackson vs. Wood, 3 Wendell, 28.

Shafer vs. Stonebraker, 4 Gill & Johns. 345.

Reeve vs. Dulby, 2 Simon & Stewart, 464.

Hopkins vs. Lee, 6 Whea. 109.

Outram vs. Morewood, 3 East. 345.

The uniform decisions of Louisiana are equally conclusive.

Peyton vs. Enos, 16 Ann. 135.

Cantrell vs. R. C. C. St. James, 16 Ann. 442.

West vs. His Creditors, 3 Ann. 530.

Cook vs. Doremus, 10 Ann. 682.

Preston vs. Slocomb, 10 R. 361.

3 Martin, 485; 7 R. 44; 1 Ann. 42.

The French authorities are equally conclusive.

Zacharie, Droit Civil Francaise, vol. 5, p. 790, has the following:

"It is thus, for example, that the judgement which

has rejected a claim in a petition of heirship, based upon a right of an intestate succession, has not the authority of the thing adjudged, with reference to a new claim of the same kind, resting on the right of a testamentary succession.

"It is thus again that the judgment which has rejected a claim in revindication, founded upon one will, does not prevent the plaintiff from bringing the same action again, founded upon another will, whether anterior or posterior to the one relied upon in his first suit."

Gilbert, in his Codes Annotés, under article 1351 of C. N., p. 352, No. 156 bis, gives this instance:

The judgment which, upon the demand of paternal relatives, declares a child illegitimate, has not the authority of the thing adjudged in favor of maternal relatives; with regard to them, the child can be declared legitimate."

"Furthermore, the judgment itself does not present the thing adjudged but upon the points which are really decided, and not upon those which are found in the decision as simply enunciated; it is in examining the questions upon which the parties were in issue, and which their contest presented for decision, the *quid judicandum*, that we may easily understand what has been decided, the *quid judicatum*."

Marcade Expln. du Code, 5 vol., p. 155.

Rule.—"Compare the proposition decided with the one set up in the new action; if the last does not contradict the first, and if they can co-exist, then the judgment on the first is no bar to an examination of the second proposition; on the contrary, if the two propositions contradict each other, and arefound incompatible, the second pretension will have been disposed of by the thing adjudged." Ib. p. 159.

"Thus, when I have failed in a suit for the revindication of an immovable, claimed under one will, and I bring a new action for the same immovable, based on

another will, my second demand is receivable, since, if the object of the two demands is the same, and the property of the immovable their cause, the title of acquisition of this property is different."

Ib. p. 173.

Another illustration of this rule is, where Pierre sold the same property to the father in 1840, and to the son in 1841. The son succeeded to his father as heir, sued for the property, relying on his own title. On this title he was defeated. He then brought another suit, based upon the title made to this father in 1840, to which he had succeeded as heir. The plea of the thing adjudged was not held good.

"But the judicial identity of the person can still be distinguished by different qualities, though this person acts in the two suits for his own account and personal benefit. Thus when a person figures in the second suit as heir to another person to whom he had not succeeded at the institution of the first suit, the thing adjudged for or against him when he was not the heir, does not bar a suit for or against him based on this title of heir, for there is not eadem conditio personarum, and the party is no more the judicial person after he has succeeded to such rights and obligations of heir, that he was in the first suit." Ib. p. 176.

In the case of Lostanges vs. Bessieres:

"This was what was decided in the Supreme Court in the year VII. A Mr. Lostanges, heir of his mother, but who had renounced the succession of his father, had recovered before the parliament of Toulouse, from a Mr. Bessieres, a domain belonging to his mother, which had been illegally sold by his father. But afterwards Lostanges, having decided to aecept the succession of his father, which he had before renounced, was sued by Bessieres for the restitution of the domain, as subject to the obligations of the vendor. Lostanges contended that his adversary was bound by the authority of the

thing adjudged. This plea was sustained in the lower court, but upon appeal the court of cassation reversed the judgment on the ground, perfectly accurate, that the parties did not proceed in the same quality as they appeared in the decree of Toulouse." * * "And in fact, if it is true that the claim of Bessieres had in the two cases the same object, to-wit: the property of the domain, and also the same cause, to-wit: the sale made by the father of Lostanges, it is clear that the contest between the two persons does not present the same condition (quality), since Lostanges, a stranger to the obligations of his father when the first suit was brought, became subject to them at the time of the second suit by his acceptance of the succession.

5 Marcade, p. 176. (In the 4th ed., 1850, it is found on p. 187.)

"Then from the moment I prove, no matter by what means, that my new suit rests upon a cause (title) different from that set up in the first suit, this demand is receivable." Ib. 173.

Belloncle vs. Samson. Gellee, a debtor of Belloncle, had granted the latter a mortgage on several immovables, by contract of the 22d January, 1814. In order to secure said debt, Gellee's wife had moreover subrogated Belloncle to the legal mortgage she held against her husband, by act of 12th December, 1819, in consideration of certain remissions and facilities which Belloncle had accorded to Gellee, his debtor. In 1826, in a concurso to distribute the assets of Gellee, Belloncle claimed to be put down in the first rank of privileged creditors, basing his claim on his own mortgage of 1814. The claim was rejected for want of reinscription of the mortgage within the last ten years. He afterwards renewed his claim, based on the subrogation of the wife's legal mortgage.

The court held:

"The creditor who has but a single right to exercise

is incontestibly held to present simultaneously all the means necessary to establish it; and should he fail in his first suit, he cannot renew his claim under the pretext that he has new means to offer. But to the contrary, a creditor who has rights distinct by their cause and object, is never bound to cumulate the exercise of them, as he can rely successively on each one of his rights. The party before the court had two distinct mortgages, one held in his own right, the other by subrogation from Gellee's wife. In the suit of 1826, he relied only on the first and was defeated in it. Consequently he could rely on the second right independently of the first." Journal du Palais, April 5, 1831; Dalloz, page 31, 1. 127.

These authorities abundantly show that defendants' objection of res judicata is not well taken, and if anything farther is needed to show how different the two cases are, we cite the language of the court in Gaines vs. Hennen:

The difference between the two cases is just that which the law of Louisiana will not permit the decision in the first to be pleaded against her in this case as a res judicata.

The case in 12 Howard, and that now under our consideration, are dissimilar as to parties and things sued for, or what is called "the object of the judgment." The suit now is not between Mrs. Gaines and Relf and Chew, but between herself as complainant and Duncan N. Hennen as defendant: Nothing was said in the first suit of the claim of Mrs. Gaines under the will upon which she now sues, as in every particular detailed in the article 2265. There are differences between her present cause of action and that formerly made, and the demand now made is not between the same parties, or formed against each in the same quality. And, therefore, upon well settled principles coincident with

the article 2265, and also independent of it, nothing that was said or done in the case in 12 Howard can prejudice her claim, as she now makes it.

We are fully satisfied from the article 2265, and the cases cited from the Louisiana courts, and from the English and American reports, that the objection of res judicata, as made against the recovery of the complainant in this case, is without any foundation in law.

X.

THIRD DEFENCE.

They say that the probate of Daniel Clark's will of 1813, by the Supreme Court of Louisiana, in 1855, is "utterly null and void *ab initio*," and of no binding force upon this court or these defendants.

1st. Because it was an *ex parte* probate and in bad faith.

2d. Because the probate of the will of 1811, being unrecalled, was a valid judgment and no other will could be probated except a direct action be first brought to annul that probate.

Lizardi R. vol. 1, pp. 67, 68, 69.
De La Croix R. vol. 1, pp. 42-3.
City of N. O. R. vol. 1, pp. 51-2.

The charge of bad faith is utterly unsupported by any evidence in this record, and we dismiss it without comment.

That the probate was *ex parte*, is in accordance with Louisiana law.

"All probates under our law are *ex parte*."

Opinion of Judge McCaleb.
Lizardi R., vol. 1, p. 923.

But the fact of the probate being *ex parte*, deprives the defendants of no rights, because the court expressly reserved the right to them, and every one, to contest this probate in a direct action with complainant.

Succession of Clark, 11 Ann., 124.

And yet the probate of the will of 1813 has remained unrecalled and unrevoked for twelve years, without any successful attempt, by any of these defendants, or any one else, to annul it.

The second reason given for the nullity of that probate, is not in accordance with the law, as declared by this court.

No *direct action* was necessary, to annul the probate of the will of 1811.

The probate of the will of 1813, *by the mere fact of its probate*, necessarily annulled the will of 1811, so far as its provisions were inconsistent, and so far as the estate was not legally administered under it.

This precise point is decided in Gaines vs. Hennen, 24 How., as follows:

"But it was also said in the argument, that no claim could be set up by Mrs. Gaines, under the will of 1813, until the will of 1811 shall be set aside. Neither the language used by the court, in 2d How. 651, nor in the decision in 12 How., will bear such an interpretation, or admit of such a conclusion. When this court said in 2 How. 651, that the will of 1813 cannot be set up without the destruction of the will of 1811, it was with reference to the existing fact that the latter had been duly proved, and that it stood as a title to the succession of the estate of Daniel Clark, and that the will of 1813

had not then been proved before a court of probate, and on that account could not be set up in chancery as an inconsistent and opposing succession to the estate, while the probate of the will of 1811 was standing in full force. And when Mr. Justice McLean, speaking for the court, 2 Howard, 647, says:

"She (meaning Mrs. Gaines, then the complainant,) must ask for the probate of the will of 1813, and a revocation of the other will, of 1811," adding, "for no probate can stand while a previous one is unrevoked," it is plain that the meaning was, as we now say it is, when a court recalls the probate of a will, substituting the probate of another will by the same testator, made posterior to the first, that the former becomes inoperative, and that the second is that under which the estate is to be administered, without any formal declaration by the court, that the first was annulled, and it makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the record. Courts of probate may, for cause, recall, or annul, testamentary letters, but they can neither destroy nor revoke wills, though they may, and often have, declared that a posterior will of a testator. shall be recognized in the place of a prior will, which had been proved, when it was not known to the court that the testator had revoked it. Such is exactly the case.

The Supreme Court decreed that the will of Daniel Clark, dated New Orleans, July 13, 1813, as set forth in the plaintiff's petition, should be recognized as his last will and testament, and the same was ordered to be recorded and executed as such."

"The decree of the court, in that particular, is the law of the case."

That a subsequent will may be probated without first annulling the prior will probated, is directly decided in Louisiana, in a very recent case, (1865,) 17 Ann. p.

189, State vs. the Judge, etc., and this, too, in a case where all the testator's property had been administered under the prior will.

But the conclusive answer to this whole objection is, that by the well settled law and practice of this court, in equity and in law, it has no probate jurisdiction. It neither probates, nor annuls the probate, of wills. When a will is duly probated by a State Court, of competent jurisdiction, that probate is conclusive of the validity and contents of the will, in this court. For ten years this complainant sought the aid of this court to annul the probate of the will of 1811, and to set up the will of 1813. But in 2 How. 644, it was decided that she must go to the State Court and obtain there the probate of the will of 1813. This she has done. Is it now a nullity?

Will this court now set the probate of the will of 1813 aside, when they refused to set aside the probate of the will of 1811, because it could not be done under the law governing this court?

It is true that some of the more recent decisions in Louisiana, assert the doctrine that the probate of a will may be collaterally attacked in another jurisdiction.

Sophie vs. Duplesis, 2 Ann. 726.
Suc. of Dupuy, 4 Ann. 570.
Abston vs. Abston, 15 Ann. 138.

But Martin, Matthews and Porter, the earlier, and by far the ablest jurists of Louisiana, assert the doctrine that "while the judgment probating a will is unreversed,

no other court can declare the will null and void, or recall its probate."

Lewis' Heirs vs. His Executors, 5 La. 594.
Derbigny vs. Pierce, 18 La. 551.

But whatever may be the recent decisions of Louisiana, it will not avail the defendants, for this court will be governed by its well recognized rule, that the probate of a will by a State Court, of competent jurisdiction, is binding upon this court. This rule has been uniformly adopted by this court from its earliest to its latest decisions, without variation, as will appear from the following cases.

Gelston vs. Hoyt, 3 Whea. 316.
Armstrong vs. Lear, 12 Whea. 175.
Elliot vs. Piersol, 1 Pet. 338.
Thompson vs. Tolmie, 2 Pet. 166.
Tarver vs. Tarver, 9 Pet. 179.
Grignon, Lessee, vs. Astor et al., 2. How. 319.
Fouvergne vs. New Orleans, 18 How. 473.
Adams vs. Preston, 22 How. 488.
Florentine vs. Barton, 2 Wal. 216.
Comstock vs. Crawford, 3 Wal. 403.

XI.

FOURTH DEFENSE.

They say that Relf & Chew, as executors of Daniel Clark, under the will of 1811, legally conveyed to them or their vendors, all the title of Daniel Clark, and they set up that title in bar of complainant's claim.

This defence is set up in the separate answer of each defendant, except the City of New Orleans, who does not claim title from them as executors. We may here state that the question of the effect of the probate of the will of 1813, *upon property duly administered upon, and legally sold by Relf and Chew, under the will of* 1811, *while its probate was unrevoked,* does not arise in this case, as complainant claims this property upon the ground that it was *never legally sold* by the executors of the will of 1811.

We will now show that the sales by Relf and Chew, *as executors of the will of* 1811, of the property claimed by these defendants, were utterly null and void, and passed no interest of the succession of Daniel Clark to the purchasers.

1st. It will appear from the exhibits of each defendant, and from the chain of title, (ante 45, 46,) that the title of each of these defendants, except De La Croix, from Relf and Chew, was made in 1819, and 1820, and 1821, more than five years after they, Relf and Chew, were appointed executors of the will of 1811, and it will appear from the record, that no authority to make said sales was given them by the Court of Probates.

But Relf and Chew, as executors of the estate of Daniel Clark, could legally make no sales, or give any title, to the property of that estate, after the expiration of a year and a day from the time of their appointment as executors, without the special authority of the court.

This is clear, both from the law of Louisiana, and the judicial decisions thereon.

By the Code of 1808, which was the law of Louisiana until 1825, and under which these sales were made, an executor's power to make sales ceased at the end of a year and a day.

Old Code, p. 246, Art. 166, 173, 174; Art. 128, p. 174.

"The executor's power under the Old Code, continued but one year: after that period their acts must be viewed as those of *negotiorum gestores*," wrong doers.

Succession of Waters, 12 Ann. 99.

Under the Code of 1808, the executor's powers expired at the end of a year, and "being but a mandatory nothing remained for him to do but render his account."

Deranco vs. Montgomery, 13 Ann. 514.
Johnson vs. Brown, 3 M. (N. S.) 601.

Previous to act of 13th March, 1837, the functions of an executor continued for one year only.

Brown vs. Williams, 16 La. 344.
Michott vs. Flotte's Adm. 12 La. 130.
Lafon Ex'rs vs. Gravier et al., 1 Martin, N. S. p. 243.
Lamothe, Ex. vs. Dufour, 4 M. 340.
Quierry Ex. vs. Faussier's Ex., 4 M. 609..

By Art. 174, Code of 1808, p. 246, an executor must sell in the way prescribed for sales by the curator of vacant successions and absent heirs.

And by same code, Art. 128, p. 174, sales by curator of vacant estates and absent heirs could only be made "publicly, to the highest bidder, after the usual notice of said sales had been given," and by order of court.

"A sale by executors, without an order of court, and by private contract, is absolutely void."

Donaldson vs. Hall, 7 Martin, N. S., p. 113.

Without an order of the Probate Court, "the executor, as such, has no right to transfer property belonging to the succession which he administers."

Lanfear vs. Harper, 13 Ann. 548.
Ventriss vs. Smith, 10 Pet. 161.
Gaines vs. Patterson, 2 How. 601.

No order of the court was ever given Relf and Chew to make these sales.

This authority is for defendants to prove, but they have offered no proof of that fact.

But the probate record of Clark's succession proves that no such order was ever given to Relf and Chew. They did not ask for it.

In no one of the acts of sale, except De La Croix, do they even pretend that they acted under the orders of the Probate Court.

Even if they had recited the order in the act of sale, it would make no proof of the fact.

The recent case of Lanfear vs. Harper, 13 Ann. 548, seems to be conclusive upon this point.

An "act ought not to have been received to prove title per se, or to show the order of the probate court, or a sheriff's sale under it. Hence his notarial act can make no proof of the transfer of the property of the succession without producing the *process verbal* of the sale."

In Gaines vs. Hennen, 24 How. 570, the court say:

The executors "disposed of the estate of Clark, both real and personal, property in co-partnership and other property, separately belonging to Clark, without ever

having received any permission to do so from the Probate court, and that should have been obtained."

In Gaines vs. Patterson, 6 How. 602, the court in passing upon these identical sales, by Relf and Chew, say:

"These sales were made after the time when, by the law of Louisiana, the relation of the sellers, as executors, had expired."

The invalidity of these sales by Relf and Chew, as executors of Clark, having been distinctly decided by this court in two cases, they are no longer open to question by these defendants, and come under the authority of Goodtitle vs. Kibbe, 9 How. 478, and Wright et als. vs. Sill, 2 Black, 543, before cited.

From this law and these authorities, it necessarily results that neither Slidell, Creppel, Senecal, or Diamond, derived any title of Daniel Clark, from the sales by Relf & Chew, as Executors, in 1819, 1820, 1821, and the City of New Orleans has not even that title. See sale of Relf & Chew to Blanc.. (Rec, vol. 2, page 1075.)

The City of New Orleans claim that Relf & Chew also acted *in their individual and personal names* in making sale to Blanc.

The act of sale to Blanc is in French. Vol 2, p. 275. The original French does not authorise any such translation as is made upon p. 1075, vol. 2. The words are "*lesquels comparans* et dits noms," &c., which does not mean *appearing in their own names* but *which appearers* and *identical persons.*

That they did not intend to sell any personal interest appears from the act, they only selling Clark's interest. But De La Croix says he derived title to his slaves from Relf within the year, and while his functions were in full force.

Now, conceding that the executors could give a good title to Clark's property to a bona fide purchaser, by sales made within a year, by complying with all the requisites of the law, which is not shown in this case; still we say De La Croix derived no title from his sales, because—

1st. The sale of fifty-five slaves of Dec. 11th, 1813, by Relf to De La Croix for $21,700, was made at *private sale*, without any order of court. Record, vol. 1, p. 432. This sale was utterly null and void.

"The sale of succession property at private sale is null and void." Donaldson vs. Hull, 7 M. 113, (N. S). There is no question as to the invalidity of this sale.

2nd. The sale of twenty-three slaves, Oct. 16th, 1813, by Relf, as executor, to De La Croix (Record, vol. 1, p. 431 (421;) translation, vol. 2, p. 1080 (1656,) conveyed no title to De La Croix, because—

(*a.*) There is no proof that said sale was made in compliance with an order of the probate court. We have before shown this was necessary, and that the recital of such an order in the act of sale does not prove it.

Lanfear vs. Harper, 13 Ann., p. 548.

There is another fatal objection to the sale of Oct. 16th, 1813, of slaves by Relf to De La Croix.

De La Croix knew at the time of the sale that the will of 1811 had been revoked ; he knew that Relf was not executor, and had no right to sell the property ; he knew of the existence and contents of the will of 1813 ; he knew he was appointed executor of that will and tutor to complainant ; he knew that the property belonged to complainant, a minor of six years of age, as to whom the father had confided to him the sacred trust of tutor, and he was buying too from the spoliator of that father's will in fraud of the interests of his ward.

Now, whatever may have been the effect of a sale by Relf to a purchaser not affected with this knowledge, De La Croix was incapable of purchasing by valid title from Relf as executor of the will of 1811.

The fact that the will of 1811 was duly probated will only aid the innocent purchaser. De La Croix had no right to treat the will of 1813 as revoked, even if it could not be found at the time of the probate of the will of 1811 ; he had no right to say it would not be found, afterwards, and the fact that the will of 1813 is now probated, relates back, and affects De La Croix with all the notice he had of its existence and contents in 1813, at the time of the sale.

That the will of 1813 was legally in existence at the time of sale is conclusively proved by its probate in 1856 by the Supreme Court of Louisiana. And that De La Croix had knowledge of the existence and contents of the will of 1813, imparted to him in this case, will abundantly appear from the following

TESTIMONY.

PROCESS VERBAL, AFFIXING SEALS. PROBATE RECORD, PAGE 9; TRANSLATION, VOL. 2, PAGE 1113.

"This day, the sixteenth day of the month of August of the Year of our Lord, eighteen hundred and thirteen, and the thirty-eighth of American Independence, we, Gallien Prenal, one of the Justices of the Peace for the City and Parish of New Orleans, were present at the decease of Daniel Clark, this day, at six o'clock in the afternoon, and were requested by Mr. Richard Relf to affix the seals on all the papers belonging to the estate of the said Daniel Clark, for the accomplishment of which we, in presence of Messrs. James Pitot and *Dusuau De La Croix*, the said Richard Relf having been requested by us to present the papers of said estate and conducted us to the room of said deceased, proceeded in presence of the witnesses above named, to remove all the said papers, and to place them in a desk and armoire, which we found in the room of deceased, after which we affixed the seals on the doors of the room, and placed Mr. Francisco Morales as guardian of the said room, who promised, under oath, to fulfill well and faithfully the duties of his charge, and has, together with us and the witnesses above named, signed the same day, month and year above mentioned.

his
FRANCISCO ✕ MORALES.
mark.

"At the moment of closing the proces verbal, the said *Richard Relf having found in a trunk of the deceased his olographic will*, he removed it in presence of the witnesses above named for the purpose of delivering it to the Honorable Judge of the Court of Probates.

(Signed,) JAMES PITOT,
DUSSUAU DE LA CROIX,
RICHARD RELF,
GALLION PRENAL,
Justice of the Peace."

To this document De La Croix signed as a witness. He knew then that the will which Relf found was not Clark's last will, because he himself swore in 1834 Probate Rec., p. 177,) that Clark, a short time before his death, showed him his last will, (of 1813) and that the superscription on it was "Pour etre ouvert en cas de mort.". To be opened in case of death.

The will found by Relf contained no such superscription, but in its place, the following: "This is my olographic will. New Orleans, 20 May, 1811. Daniel Clark." Probate Record, p. 12–13.

The superscription and date were notice to De La Croix that Clark's last will was not the one presented by Relf.

This will was not then found by Relf in the black trunk. Three days before Relf pretended to find it, it had been filed in the Probate Court by some one. Relf found it Aug. 16, but Aug. 13, as soon as it was sure Clark would die, it was filed in court. (Deposition of Fagot, Lizardi Record, vol. 1, p. 233.)

Who it was that took that will before Clark's death, and filed it in the court of probate, it is easy to tell in the light of subsequent events, and by the evidence of Boisfontaine and others.

That Relf did not find it in the trunk, is proved by Preval's deposition, as follows:

TESTIMONY OF G. PREVAL, PROBATE RECORD, Page 8.

"Witness was not present when Clark died, but was there a few minutes after his death. He was called

there as a justice of the peace to affix the seals to the effects. The document marked A is the proces verbal of the affixing of the seals. *Previously to the affixing of the seals upon the armoir, desk, etc., witness searched everywhere for his last will, which he had been informed before his death was put in a little black trunk in his bed-room. Witness, therefore, looked with particular attention and care in a little black trunk, and did not find the last will in it.* Witness got this information from Mr. James Pitot, the old parish Judge at the time. After looking at that trunk and not finding it, witness looked in the desk and the armoir, and could not find any last will; and then witness proceeded to affix the seals, and appointed Francisco Morales keeper, who signed the process verbal. At the moment of the closing the process verbal, Mr. Richard Relf came to witness and presented him with a paper which he said was the last will of Daniel Clark."

De La Croix's knowledge that the will found by Relf was not Clark's last will is conclusively shown by his petition and affidavit in opposition to the proof of the will of 1811.

PETITION OF DE LA CROIX, PROBATE RECORD, pp. 10–11.

To the Hon. the Judge of Court of Probates of the Parish of New Orleans:

The petition of Francis Dusuau De La Croix, of this parish, planter, respectfully showeth that your petitioner has strong reasons to believe, *and does verily believe*, that the late Daniel Clark has made a testament, or codicil, posterior to that which had been opened before your honorable court, and in the dispositions whereof he thinks to be interested.

And whereas, it is to be presumed that the double of this last will whose existence was well known by several persons might have been deposited with any notary public of this city; your petitioner, therefore,

prays your honor to order, as it is the usual practice in such case, that every notary of this city appear before your honorable court within the delay of twenty-four hours, in order to certify, on oath, if there does or does not exist in his office any testament or codicil, or any sealed packet, deposited by the said late Daniel Clark.

And your petitioner, as in duty bound, will ever pray, &c. (Signed) SEGHERS,
Of Counsel for Petitioner.

AFFIDAVIT.

Francois Dusuau De La Croix, the above petitioner, maketh oath that the material facts in the above petition set forth are true to the best of his knowledge and belief. DUSUAU DE LA CROIX.

Sworn to before me, Aug. 18, 1813.
THOS. BEALS, Reg. of Wills.

TESTIMONY OF DE LA CROIX, PROBATE RECORD, pp. 77–78.

Dusuau De La Croix, witness for the applicant, Shawnbourg, sworn. Says that he was very intimate with the late Daniel Clark for a great many years, and up to the time of his death; that some few months previous to the death of said Daniel Clark he visited deponent on his plantation, and expressed a wish that he, deponent, should become his executor. Deponent at first refused, but after a little, from the persuasions of said Clark, he CONSENTED TO BECOME HIS EXECUTOR; * * * * * * * * that a month or two after this conversation at the plantation of deponent he, deponent, called to see Clark at his house on the Bayou Road; he there found him in his cabinet, and HAD JUST SEALED UP A PACKET, THE SUPERSCRIPTION ON WHICH WAS AS FOLLOWS: "POUR ETRE OUVERT EN CAS DE MORT." Clark threw it down in the presence of deponent, and told him that it contained his last will and some other papers, which would be of service; depo-

nent did not see the will ; nor does he know anything about its contents ; he only saw the packet with the superscription on it, as above related. In the conversation he had on his plantation, as above related, Clark requested him, deponent, not to say anything about it to R. Relf and B. Chew ; he observed also that he had named R. Relf and B. Chew as his executors IN A FORMER WILL, and on that account it was that he wished nothing said to R. Relf and B. Chew; * * * * * * * * that Clark never spoke to deponent about Mirah except on the occasion before related, on deponent's plantation. He then spoke of her as his DAUGHTER. Clark observed to deponent, at the time he showed him the packet which he said contained his will, that in case of his death IT WOULD BE FOUND IN A SMALL BLACK TRUNK which he had there.

The execution of the will of 1813 by Clark ; the mysterious disappearance of that will at his death; the connection of Richard Relf with that disappearance of the will, and De La Croix's knowledge of all these facts appear from the following testimony of Clark's intimate friends, Col. Bellechasse and P. Baron Boisfontaine.

TESTIMONY OF COL. BELLECHASSE, PROBATE RECORD, Pages 157–158.

* * * * * *

"He, Clark, took from a small black case his said last will and gave it, open, to me and Judge Pitot to look at and examine. It was wholly written in the handwriting of said Daniel Clark, and was dated and signed by the said Clark in his own handwriting. Pitot, De La Croix and myself were the executors

named in it, and in it the said Myra was declared to be his legitimate daughter, and the heiress of all his estate. * *

On the next day, without receiving any message from Relf, I went and found Clark dead. I continued my way till I reached Pitot's, who I found much affected by the death of Clark, and very indignant at the conduct of Relf, as well for having always prevented the assistance of Clark's friends, as for not having notified them (particularly him, Pitot, who lived near Clark) of his approaching dissolution; that by their presence the fraudulent suppression of the last will of Clark might have been prevented. What, I said, is Clark's last will disappeared? Yes, my friend, it was not in the case in which he had placed it, and the succinct and provisional will of a dozen lines which he previously made when about sailing for the north, and which he delivered to Relf, had been brought forward by Relf. Pitot, as well as others, always spoke with the utmost indignation of the fraudulent suppression or destruction of the said last will of 1813 and the fraudulent substitution in its place of the provisional will of 1811, which we attributed to interested villainy."

TESTIMONY OF P. BARON BOISFONTAINE, PROBATE RECORD, Pages 147, 148, 149.

"Mr. Clark left at his death a daughter named Myra. * * * * * *

The day before he died he spoke to me about her with great affection, and as being left his estate in his last will. The day he died he spoke to me of her with the interest of a dying parent, and as heir of his estate in his last will. * * * * * About ten days before Mr. Clark's death I was present at his house when he handed to Chevalier De La Croix, a

sealed packet, and told him that his last will was finished and was in that sealed packet.

The day before he died he told me that his last will was below in the office room, in his little black case. The day he died he mentioned his last will to me.

I was present at Mr. Clark's house, about fifteen days before his death, when he took from a small black case a sealed packet, handed it to Chevalier De La Croix, and said: My last will is finished; it is in this sealed packet, with valuable papers. *As you consented, I have made you in it tutor to my daughter. If any misfortune happen to me, will you do for her all you promised me?* Will you take her at once from Davis? I have given her all my estate in my will, and annuity to my mother, and some legacies to friends. You, Pitot and Bellechasse, are the executors. About ten days before this Mr. Clark, talking of Myra, said that his will was done. Previous to this he often told me, commencing about four months before his death, that he was making his last will. In these conversations he told me that Chevalier De La Croix had consented to be her tutor, in his will, and had promised, if he died before doing it, to go at once to the North and take her from Mr. Davis; that she was to be educated in Europe. He told me that Chevalier De La Croix, Judge Pitot and Colonel Bellechasse were to be executors in this will.

Two or three days before his death I came to see Mr. Clark on plantation business; he told me he felt quite ill. I asked him if I should remain with him. He answered that he wished me to. I went to the plantation to set things in order, that I might stay with Mr. Clark, and returned the same day to Mr. Clark and stayed with him constantly till he died. The day before he died Mr. Clark, speaking of his daughter Myra, told me that HIS LAST WILL WAS IN HIS OFFICE ROOM BELOW, IN THE LITTLE BLACK CASE; that he would die contented, as he had insured his estate to her in the will. He mentioned his pleasure that he had made his moth-

er comfortable by an annuity in it; and remembered some friends by legacies. He told me how well satisfied he was that Chevalier De La Croix, Judge Pitot, and Bellechasse were executors in it, and Chevalier De La Croix, Myra's tutor. About two hours before his death, Mr. Clark showed strong feelings for said Myra, and told me that he wished his will to be taken to Chevalier De La Croix, as he was her tutor, as well as one of the executors in it; and just afterwards Mr. Clark told Lubin, his confidential servant, to be sure, as soon as he died, to carry his little black case to Chevalier De La Croix. After this, and a very short time before Mr. Clark died, I saw Mr. Relf take a bundle of keys from Mr. Clark's armoir, one of which I believe opened the little black case. I had seen Mr. Clark open it very often. After taking these keys from the armoir, Mr. Relf went below. When I went below I did not see Mr. Relf, and the office room door was shut. Lubin told me that when Mr. Relf went down with the keys from the armoir he followed; saw him then, on getting down, go into the office room; and that Mr. Relf, on going into the office room, locked the office room door. Almost Mr. Clark's last words were that his last will must be taken care of on said Myra's account.

Who can read the testimony of Boisfontaine and Bellechasse, and doubt that Daniel Clark died leaving the will of 1813 in existence as his last will and testament, while his last dying words were for the preservation of that will, and his last thoughts for the welfare of his daughter, whose rights were secured therein.

Who can doubt what became of the will of 1813 when this testimony shows that Relf took from the dying man's armoir the keys that opened the "little black case" that held the will of 1813, and went into

the room where it was, and then after the dead man's effects were sealed up, brings forward the will of 1811, saying he had found it in a trunk—when the record shows it had then been filed in the Probate Court three days before he found it in the trunk. Vol. 1, p. 99.

To this De La Croix signs himself a witness.

Did not De La Croix then believe, as he stated under oath the next day, that Daniel Clark left a will posterior to the will of 1811?

If this be true, Richard Relf, though clothed with all the outward forms of law as executor of the will of 1811, could convey no title to De La Croix of any property that belonged to the minor daughter of his friend, Daniel Clark, who had died entrusting him with the tutorship of that daughter, in the full belief that he would act as a father to his child.

We, therefore, respectfully submit that De La Croix derived no title to the slaves by the sale to him from Richard Relf as executor of Daniel Clark's estate.

XII.

Fifth Defence.

They say that all this property was legally conveyed to them or their vendors by Relf and Chew as attorneys of Mary Clark, and that those sales gave a good and valid title to them, because Mary Clark was the real heir of Daniel Clark, or, if not, that she was "sole

instituted heir," and, as such, could give a good title as against the real heir subsequently discovered.

Lizardi Rec., vol. 12, p. 70.

This power of attorney is found in Probate Record, pages 71–72.

To this defence we say:

1st. Mary Clark could give no title as the real heir of Daniel Clark, because, by the law governing this case, Mary Clark was not the real heir of Daniel Clark, and of necessity had no title as his real heir.

We have before shown (ante p. 48) that the law of this case is that complainant is the only legitimate child and sole heir of Clark, and sole legatee of his last will, which status and will are not open to contest in this case, and hence Mary Clark could, in law, have no title as heir, and could convey none.

2d. Mary Clark, as "sole instituted heir" under the will of 1811, *could give no title to any purchaser as against the real and paramount heir.*

What is the title of the instituted heir under the law of Louisiana as against the paramount heir?

The French writers have held different doctrines upon this subject.

Merlin, in his Repertoire de Jurisprudence, verbo Succession, sec. 1. §5, No. 2, upon the authority of certain cases in the court of cassation, says that the instituted heir can transfer to a bona fide purchaser a titie good against the paramount and real heir. But Toul-

lier, Troplong, Duranton and other distinguished French jurists lay down a contrary doctrine—that the instituted heir can convey no more title than he has—a title that must yield to that of the real heir. But the doctrine of Merlin is expressly repudiated by the Supreme Court of Louisiana, and that of Toullier and others adopted.

Balot y Ripoll vs. Morina, 12 R. 560.

By the Law of Louisiana, the title of the instituted heir is good against all the world except against the title of the real and paramount heir; and he can convey no greater title to any vendee.

This is the necessary result of a a fundamental principle of the civil law that no man can convey more than he has himself.

12 Robinson's R. p. 560. "There are no maxims or rules better understood in the civil law than these: "Id quod nostrum est, sine facto nostro ad alium transferri non potest." And, "Nemo plus juris in alium transferre potest quam ipse habet."

Our Code, Art. 2427, declares that the sale of a thing belonging to another person is null.

"It is an undisputed principle of our code that the sale of another's property is null."

Lafon et al. vs. De Armas, 12 Rob. 626.
Beaumon vs. Thomas, 1 Ann. 284.
Hall vs. Crenill, 3 Ann. 326.
Dryson vs. Phelps, 14 Ann. 722.
Old Code, Art. 20, p. 348.

It is unquestionably true, as the general rule, that no

man can be divested of his property without his own consent, *and consequently that even the honest purchaser under a defective title cannot hold against the true proprietor.*" Nemo plus juris in alium transferre potest quam ipse habet.

Moore vs. Lambeth, 5 Ann. 66.

But as a decisive authority against the validity of this defence, we cite the case of Balot Y. Ripoll vs. Morina, 12 R., 552. The precise point in issue in the present defence is there decided.

"Sebastian Ripoll died in New Orleans in 1836. He left by will to his universal legatee, Teresa Morina, his natural daughter, all his property. His will was duly probated, and Teresa Morina put in possession, by order of the court, of all his property as testamentary heir.

"Teresa sold a lot of land (part of the estate) to a bona fide purchaser, and that purchaser sold it to another bona fide purchaser. Some ten years after, two sisters of Ripoll brought suit against this last bona fide purchaser for the land, claiming it as the real heirs of Ripoll, and to set aside the will. The will was set pasie. The defendant set up the defence that is set up in the present case,—that he was a bona fide purchaser from tbe apparent heir and universal legatee, and also that there was a judgment of the Probate Court putting his vendor, Teresa Morina, in possession of this property as testamentary heir. The case raised this precise question. We give the language of the court as to the question decided,

"Can those who have purchased property from Teresa Morina, who was the apparent heir or universal legatee of the deceased, and who had been put in possession as such, retain possession of the real estate against the claim of the real and actual heirs?"

The court decided that the bona fide purchaser from

the testamentary or instituted heir took no title as against the title of the real or paramount heir.

And they say:

* * * "Here it is true Teresa Morina, who had been put in possession of the estate, was the only apparent heir of the testator under the decree of the Probate Court ordering the will to be executed, and might have been, perhaps, fairly supposed to be the exclusive owner of the property purchased; but the purchasers might have also used due precautions to ascertain the extent of her rights.

* * * * But be this as it may, it does not seem to us that the purchasers of the property in dispute can, under any circumstances, have acquired any greater right, or any better title to it than their vendor herself had."

That case goes much further than the present case requires, because Mary Clark was never recognized by the Probate Court as heir, or put in possession of this property.

3d. Even if Mary Clark had any title which she could convey, that title was not conveyed by Relf and Chew, by the sales set up by these defendants, because,

a. This power of attorney from Mary Clark was not authenticated as required by the Act of Congress of 1804, to prove documents not of a judicial character, to be used in another State than that in which they were made.

The court will perceive, Probate R., pp. 71-2, that it was proved by one witness before John Parker, Esq., Mayor of Philadelphia, that the signature of Mary Clark was genuine. The Mayor's capacity, as such,

and his signature, are not proved by any evidence whatever.

Our courts of Louisiana have repeatedly held that acts done under such powers of attorney will not affect the rights of third persons.

In Jewett vs. Davis, 5 M., (N. S.) p. 433, where a power of attorney was acknowledged by the principal, before the Mayor of New York, who gave his certificate and seal to that fact, Porter, J. held :

"We are clearly of opinion that it (the certificate) is not legal proof of the fact which it is offered to establish. We have not particular knowledge of either the seal or handwriting of the Mayor of New York, and to admit inferior evidence of this kind" (parol) "would open the door to numerous frauds."

It will be seen that Mrs. Clark did not even acknowledge the instrument before any officer whatever.

This acknowledgment of the instrument, and its registry, were expressly required by the code of 1808, page 306, Art. 228.

Act under private signature, expressing a sale or exchange of immovables or slaves, must be acknowledged and registered in the office of a notary public, six days from their date, if they be passed in the city of New Orleans, or within its liberties, and within ten days from their date, if they be passed without the city and its liberties, in any part of the territory.

If not so registered they shall have date as to third persons only from the day this formality was complied with.—Ibid.

The power of attorney in question was recorded in the "notarial register" of Clement Biddle, in Philadel-

phia, October 4, 1813; but not in the "territory of Orleans," where it ought to have been, and without the "acknowledgment" required in the article just cited. When the same document was registered in the office of John Lynd, in 1817, in New Orleans, there was then no acknowledgment, nor any proof to the signatures of the instrument.

An act sans seing prive cannot be admitted in evidence without proof of its execution." Griffith vs. Toombs, 6 N. S., 262.

The power of attorney (of course acknowledged, proved, etc., as required by law,) must be produced and made part of the act of sale. Bedford vs. Urquhart, 8 La., 239.

The power of attorney was an essential ingredient in the title made by the agents. So important, indeed, that without its production, recognition and registry, their sales would not be considered as translative of property. It would be a sale simply by parol.

b This power of attorney is insufficient to authorize Relf and Chew to convey Mary Clark's interest in the land in question, because it contains no specific description of the land to be sold, as required by the law of Louisiana.

The question is, whether this is an "express and special power" to sell any specific property found in the estate of Clark—such a power as Article 2966 of the Civil Code requires? Or does it give a mere power of administration—that is, to preserve the property, as in C. C. 2965? An act of sale passes no title, unless the

property conveyed is so accurately described that it may be identified without evidence aliunde.

If it is required in the owner to give this description, it could not be omitted, in conferring a power to sell on a third person.

In Pargoud vs. Pace (10 A. 615,) the court held that a sale could not be made under a general description.

Under a deed conveying "all her interest in a partnership, theretofore existing between them, including stock in trade, merchandize of every kind, credits in Ouachita parish, and in New Orleans, real estate, slaves, cash, etc. Such a sale of real estate cannot be considered as binding against third parties, for the want of a description of the things sold. To eke it out by parol evidence would be a violation of the rule of evidence, in relation to the sales of real estate, contained in the Code. See also C. C. of 1808, p. 388, Article 5."

The instrument in the case cited was so much the more descriptive of the property to be disposed of, that it had at least a territorial and geographical limit, being in "Ouachita Parish" and in "New Orleans;" while that contained in the power of attorney had no real habitation whatever.

Nor can it be maintained, in answer to views herein expressed as to the insufficiency of the power of attorney on account of the want of description of the thing to be sold, that the agents, Chew and Relf, have cured the defect, by giving a particular description of the thing sold under power of attorney. The extent of the power of

an agent is to be tested by the authority delegated to him. To say that an agent can cure a defective power by something which he can add to it, would be to confound the duties of an agent with the power of a principal. One creates a power to act; the other acts under the power. If there is no power to act given, there is no agent; if there is a defective power, then the agent cannot act under it. If an agent can cure a defective power, by enlarging it, to that extent he assumes the functions of a principal; he creates a power in himself.

4th. A conclusive answer to the claim of these defendants, that they derived a valid title to this property through the sales of Relf and Chew, under the power of attorney of Mary Clark, is this:

These sales of Clark's estate by Relf and Chew, under this power of Mary Clark, have been repeatedly passed upon by this Court and their invalidity judicially determined. This question is not open to defendants; it is *res judicata*. In Gaines vs. Patterson, 6 How. 550, the Court says, in speaking of these sales:

Nor can it be said they were legal, on account of the power of attorney given to Mr. Relf and Mr. Chew by Mrs. Clark, the mother and universal legatee of the testator. She could give no power to the executors to dispense with the law prescribing the manner for making the sale of a succession. Her power of attorney was not of itself, nor was it treated by the executors, to make for her a legal acceptance of the succession. It was neither an express nor a tacit acceptance of the succession, casting upon her the responsibilities resulting to a donee of a succession by its acceptance. It might have been used as an act done by her from

which her intention to accept the succession might have been inferred, which would have been a legal acceptance. But it was not so treated. Until the acceptance was made, as the law required it to be, every act performed under it by the attorneys was void. The power was also given when the possession of the estate was lawfully in the executors, for the purpose of enabing them to discharge their functions according to law. It would not invest them with any power, either when their connection with the estate as executors existed or afterwards, to sell any part of it in a way not permitted by the law. One of the executors, Mr. Relf, received letters testamentary on the 27th August, 1813; the other, Mr. Chew, on the 21st January, 1814. Without delay, on the same day that he received letters, Mr. Relf applied for leave to sell the movable and immovable property of his testator. It was granted. For reasons stated in a subsequent application, he applied for an extension of the order as to the time for making a sale. It was allowed, without any alteration of the times for advertising the property he wished to sell, as fixed in the first order. The movable effects were to be advertised ten days; the slaves and other immovable effects, thirty days. The defendant depends upon these orders for the regularity of the sales, and the validity of the pnrchase made by his alienor, Correjolles, the original purchaser. The sale of the property bought by Correjolles, was made in 1820. The time for making the sales, according to the order of the Court, had passed more than six years. The time within which the executors could act as such, by the law of Louisiana, had expired. They had neither legal nor delegated authority from the donee of the estate, recognized as such by the law of Louisiana, to make the sale. It was a sale without judicial order—a sale in disregard of, and in violation of. the law—which the law of Louisiana makes absolutely void. If considered as having been made under the orders for sale given by the

Court, it is also absolutely void. It is necessary to show, in all cases of forced sales—meaning such as are done by judicial order, particularly of the property of succession, or estate of a deceased person—that all the formalities of the law have been strictly complied with, or the sale will be annulled.

In Gaines vs. Hennen, 24 How. 555, upon the same point, the Court say:

This power was given, and under it without any notice to the Court of Probate, which ought to have been given and the power filed in it, they continued, as the testimony in this case shows, to act as executors, and to dispose of the estate of Clark, both real and personal property in copartnership, and other property separately belonging to Clark, without ever having received any permission to do so from the Court of Probate, and that should have been obtained, as Mary Clark had not been acknowledged by the Court as the universal legatee of Clark. It may be that they mistook their powers in doing so, but they received the estate of Clark in *fiduciary* character, to be accounted for to the legatees and creditors, according to their rights under the law of Louisiana, and for that they are responsible. Besides, the power from Mary Clark was given to them as executors, that she might have the benefit of those responsibilities for the faithful execution of the trust that they were under by the law of Louisiana as executors. They paid debts, received moneys, sold property, and acted throughout as if they were not responsible to the Court from which they derived their testamentary letters, or to Mary Clark; and, as the record in this case shows, without sustaining the transactions by vouchers of any kind.

XIII.

SIXTH DEFENCE.

They claim that Clark died insolvent—that his estate

owed large debts, and that the will of 1813 provided for certain legacies; and they seriously set up as a defence to complainant's suit to recover the testator's estate, that she should first pay the debts of the estate and discharge the legacies. They set up debt in bar to title. Lizardi Rec., p. 80, vol. 1.

This is certainly a singular defence. The position is this: That a legatee cannot recover the estate of the testator which stands charged with the payment of debts and legacies from a wrongful possessor, until he shall have first paid those debts and legacies—that is, that he shall pay the debts and legacies out of the estate, but shall not have the estate till he pays the debts and legacies.

The statement of the defence is its best answer.

Although we do not deem the insolvency of Daniel Clark, if it were proved, to be available to these defendants against complainant's claim to the title of this property; yet a former member of this Court, who gave the dissenting opinion in Gaines vs. Hennen, 24 Howard, seemed to assume that Daniel Clark was utterly insolvent at the time of his death. We desire to show from this record how entirely unsupported is any such assumption.

1st. It is evident from the testimony of Mrs. Smyth, Col. Bellechasse and Boisfontaine, witnesses for complainant, (Probate Record) that Clark himself thought he was leaving to his daughter a very large estate. His whole conduct and conversations about his will, as

admitted by these witnesses, shows that he thought he was possessed of vast wealth.

2nd. We will now prove, by evidence introduced into this record by the defendants themselves, not only that Daniel Clark's estate was not insolvent, but that it was largely solvent—solvent to the amount of many hundred thousand dollars, at the time of his death.

Defendants seek to prove his insolvency by Clark's letters and statements. This is legitimate evidence.

We will first notice the same kind of evidence—Clark's statements and declarations—put in evidence in this case by defendants.

They introduced the record of the suit.

Whitney vs. O'Bearne, vol. 2, Lizardi Record, p. 705 to 791.

In that record is the deposition of Col. S. B. Davis. In that deposition he says, in May, 1811, Daniel Clark showed him a "schedule of the property possessed by him, and the debts for which he was liable in Louisiana, by which it appeared there was a balance in his favor of about five hundred thousand dollars, to the best of my recollection, after all his debts were paid."

Page 713.

In the same record is the deposition of Harriet Smith. Page 722.

She testifies of Clark's declaration, while he was making his last will. in June and July, 1813, within two months of his death.

She says: "At the period of making his will of

1813, he often spoke of the great wealth his daughter would possess as his heir. From the inventory of the property in this will of 1813, I also judged that he was rich."

Clark said "all his motive for accumulating property was for her (his daughter's) sake."

Clark said "his object was to place her at the head of his estate."

After the will was finished, "he expressed great satisfaction that, however soon he must die, his estate was secured to her beyond accident."

He said "that he would cover her with fortunes."

"He spoke of the wealth she would possess as his heir."

The day before his last sickness, she says "he talked about her education, about her great wealth as his only heir, as by the time she grew up, the value of his estate would be manifoldly increased."

In the same record is the deposition of Pierre Baron Boisfontaine. He says:

About ten days before Clark's death he said "he should give her all his property." "The day before he died, Mr. Clark, speaking of his daughter Myra," told me "he could die contented, as he had insured his estates to her in the will."

"The day he died he spoke of her with the interest of a dying parent, and as heiress of his estates in his last will."

"About two hours before he died he spoke of his last will and his daughter Myra, in connection." "Almost his last words were about her, and that his will must be taken care of on her account."

These declarations of Daniel Clark, found in a record introduced as evidence by the defendants, commencing two years before his death, with $500,000, and ending two hours before his death, may not prove that he was

solvent, but they certainly prove *that he died in the full belief that he was leaving to his daughter a very large estate*, and are utterly inconsistent with any idea of insolvency on the part of Clark.

3d. We will now notice another important piece of evidence upon this point, introduced by the defendants —the petition of Relf and Chew for a respite, found on page 619, vol. 2, Lizardi Record.

Eight months after Clark's death, Relf and Chew filed that petition for Relf and Chew and the estate of Daniel Clark, in the First Judicial District Court. In that petition they state under the oath of Richard Relf, that "they believe the assets to be very abundant to discharge every debt due and owing by them, and *to leave a large surplus to themselves and to the heirs of the late Daniel Clark.*"

They also filed, under oath, a statement of the debts and assets of Relf and Chew, and of Daniel Clark, by which they show:

Debts of Relf and Chew	$81,484 13
Debts of Daniel Clark	124,238 65
Total	205,722 78
Assets of Relf and Chew	$63,972 00
Assets of Daniel Clark	541,696 50
Total	605,668 50

They then file a supplemental statement, increasing the debts about $15,000, and the assets about $40,000.

Thus by defendants' own showing, Daniel Clark's estate, eight months after his death, was solvent, to the amount of more than $400,000.

Relf and Chew did not include, in this statement of Daniel Clark's estate, any of the property now in suit with De La Croix, City of New Orleans, and Lemeyer, nor did they include property belonging to Daniel Clark, which they afterwards sold for more than $200,000, which would increase Clark's property, over and above his debts, to more than $600,000.

We submit one more piece of evidence, coming from defendants. In their answer they set forth the accounts of Relf and Chew, as executors of Clark, filed in the Probate Court 25 years after Clark's death, in 1838. They cannot object to the use of them as evidence.

Probate Rec., P. 84.

Those accounts show that *Daniel Clark's estate was solvent many hundred thousand dollars, in* 1838. After the executors had *quieted De La Croix* by sacrificing the canal contract and slaves—after they had sold the estate now claimed by Lameyer, and never accounted for it to any one—after supporting the house of Chew and Relf for 25 years—after contributing to pay the debts of the insolvent house of Chew and Relf—after charging his estate with nearly $100,000 for "incidental expenses," and for Relf and Chew's voluntary subscriptions to troops and fire companies, and lawyers' fees for defending Relf's private libel suits—after increasing the amount of Clark's debts from $124,238 55, as their

sworn statement shows in 1814, to $521,396 44, as their account in 1838 showed them to be—*that account still showed that Daniel Clark's succession had left unadministered by Relf and Chew*, PROPERTY WHICH WAS INVENTORIED BY RELF, IN 1814, AT MORE THAN $175,000, AND ALL CLARK'S LAND ESTATE IN MISSOURI, WORTH, TO-DAY, MANY MILLIONS OF DOLLARS.

No estate could be insolvent in 1813, that could survive a twenty-five years administration of Richard Relf, with such a surplus.

XIV.

SEVENTH DEFENCE.

They say that complainant ought not to recover her claim as set forth in her bill, because the account of Relf and Chew, as executors of the will of 1811, was duly homologated by the Probate Court of New Orleans, in 1841, approving of the sales made by the executor, of the land in contest in this suit, and of the application of the purchase money to the payment of Clark's debts, etc., and that this homologation is a binding judgment upon complainant.

Lizardi R., vol. 1, pp. 69-70.

The first answer to this objection is, that it is immaterial to any issue in this case.

The accounts of Relf and Chew "we do not think are put in issue by the bill of complainant, or the answer of the defendants, particularly as Relf and Chew are not parties to this proceeding."

Opinion of the court in Gaines vs. Hennen, 24 How.

The second reply is, that if the allegations were true, it cannot affect the present claim of complainant, because her claim is based expressly upon the fact that the sales to these defendants, by Relf and Chew, as executors, were null and void, even under the will of 1811, and it is out of the power of the Probate Court of Louisiana, by any act of homologation, to make a sale valid by their decree, which was illegal by the law of Louisiana.

The third reply to this objection is that it is not true in point of fact. That account was never homologated so far as complainant is concerned.

This appears from the Probate Record, p. 83 to 130.

Twenty-five years after their functions had ceased as executors, Relf and Chew, in 1838, filed their first account of their proceedings in the Probate Court.

A. Hoa, Esq., was appointed to represent the absent heirs of the estate.

Mrs. Gaines was an absentee, never having lived in Louisiana since her father's death.

To that account Caroline Barnes and Eleanor McNiff filed an opposition making forty-one specific objections to the same.

Among these objections they oppose particularly the sale, by the executor, *of each piece of property in contest in this suit* except that of Lameyer, *as illegal, null and void,* with special reservation and notice that *they will recover said property of any person who may be in possession of it.*

The proceeds of the sale of Lameyer's land was not in the account and never has been accounted for, to the estate, by Relf and Chew.

A. Hoa, attorney for the absent heirs, joins in the same opposition, of Caroline Barnes, and makes the same objections, and gives the same notice that the absent heirs, (Mrs. Gaines,) will recover this estate wherever found.

Widow Boisfontaine files an opposition to each and every item of the executor's account.

Richard Raynal Keene files an opposition to the same account.

The Ex. of A. Cavalier file an opposition to the same account.

April 17, 1841. That account was homologated by the Probate Court, *in all respects in which it is not opposed.*

The judgment is as follows :

In the Probate Court in and for the parish and city of New Orleans, Saturday, 17th April, 1841.

Succession of Daniel Clark.

On motion of L. C. Duncan, of counsel for Beverly Chew and Richard Relf, testamentary executors of Daniel Clark, and on showing to the court that due publications had been made of the account filed by said executors in this court on the 27th August, 1838, it is ordered by the court that said account be homologated and confirmed in all respects in which it is not opposed.

New Orleans, 22d April, 1841.

J. BERMUDEZ, Judge.

But upon the day of that homologation the opposition of the absent heiress (Mrs. Gaines) and of Boisfontaine and Cavalier, Ex'rs, and Keene, was still pending in that court, and as to their opposition, the accounts of Relf and Chew were not then homologated, hor have they ever been homologated to the present time, more than half a century after their functions closed as executors of Daniel Clark's estate.

The opposition of Caroline Barnes and Eleanor McNiff, two entire strangers to this estate, were withdrawn. How? In the same way that De La Croix's opposition to the will was withdrawn. The *modus* is explained on page 130 of Probate Record.

Relf and Chew, as executors of Daniel Clark, bought off their opposition by conveying to Caroline Barnes and Eleanor McNiff all the vast possessions belonging to the succession of Clark in St. Louis, and in Missouri, whose value to-day is many millions of dollars.

Thus Relf and Chew, *the early friends* of Daniel Clark, and the *faithful guardians* of his succession, *settled his estate and homologated their accounts.*

But the homologation of Relf and Chew's account as to all persons except the opponents thereto, may have a very important bearing upon the decision of this cause, but very different from what defendants claim.

They say that all persons had notice of its being filed. Defendants, then, alike with complainant, had notice of the account and of the oppositions.

But two years before the filing of that account each

of these defendants, or their grantors, also had notice by the filing of complainant's bill of 1836, and the service on them, that their title to the estate in controversy in this suit was utterly null and void from Relf and Chew. They had also notice by that bill of the will of Daniel Clark of 1813, and of the rights of complainant under that will.

They also had notice by the opposition filed by the attorney of the absent heiress (Mrs. Gaines) that she would seek to recover that estate wherever she could find it. (Spec. No. 5, p. 112 P. R.) They also had notice by that opposition that the pretended debts of Clark in Relf and Chew's account were not due.

The account of Relf and Chew showed that they had money in their hands enough to pay back to each defendant or his grantor, all that had been paid for their purchase.

They could have gone before the Probate Court and had their sale rescinded and their money paid back or deposited under the direction of the court till the question of title was settled. And yet these defendants, or their grantors, with full notice of the defects of their title, and that complainant would seek to recover the estate from them, with full notice not to allow their purchase money to be paid for pretended or real debts of Clark—they choose to abide by their title and let their money go, where the rent of this vast estate has gone—into the custody of Relf and Chew.

We therefore respectfully submit these facts as a full

and conclusive answer in equity to any claim of defendants, that complainant ought not in equity to proceed because the purchase money of their estate has gone to pay the debts of Daniel Clark.

XV.

EIGHTH DEFENCE.

They set up certain pretended outstanding titles to a portion of this estate in other persons than the complainant and defendants, as objections to complainant's right to recover, to-wit:

1st. The title of Mary Clark as forced heir of Daniel Clark. Lizardi R. p. 80.

2d. The title of Zulime Carriere in community as widow of Daniel Clark, and mother of complainant. Lizardi R. p. 80.

3d. The title of Caroline Barnes, the "equally legitimate child" of Daniel Clark, as forced heir of Daniel Clark. Lizardi R., vol 1, p. 80–81.

The reply to the first objection is, that it is not true in point of fact. By the law of Louisiana, C. C. Arts. 1480–1481–1482, the mother, Mary Clark, is not the forced heir of Daniel Clark, the deceased, if he leave legitimate children at his death. And we have before shown that for this case the status of complainant is irrevocably fixed by the decree of this court as the legitimate child of Daniel Clark." Mary Clark, the mother, cannot, therefore, be the forced heir of Daniel Clark.

Equally conclusive is the reply to the second objection, because either Zulime Carriere was the lawful wife of Daniel Clark, or she was not. If she was not, *then there was no outstanding title in her, as widow in community.*

If she was his lawful wife, *that of necessity makes complainant her legitimate child and heir at law.*

Now as she died in 1853, (Lizardi Rec., vol. 1, p. 232,) complainant must take her estate by inheritance.

The case of Gaines vs. Relf et al., 12 How., is not *res judicata* as to complainant's *title from her mother by inheritance.* Her mother's title was, therefore, in complainant when her Bills were filed in 1856. In legal effect, therefore, defendants say complainant cannot recover from them this estate, because one half of it once belonged to complainant's mother, which title now belongs to complainant as her heir. It is certainly a new defence in equity that complainant cannot recover because of a former outstanding title which she now owns herself.

The reply to the third objection is the same as to the first. By the law of this case, complainant is the "only legitimate child of Daniel Clark, and therefore Caroline Barnes cannot be *forced heir* of Daniel Clark. Besides, Caroline Barnes, in her answer to the bill of 1836, vol. 2, p. 632, avers that she is the illegitimate child of Daniel Clark, and an adulterous bastard of Daniel Clark.

XVI.

NINTH DEFENCE.

They claim that complainant cannot recover all the estate in her bill claimed, because, although the legal title of all of it was in Daniel Clark at the time of his death, yet there was an outstanding equitable title in Relf and Chew to two-thirds of the property claimed by complainant, by virtue of a partnership agreement of 19th June, 1813, between Daniel Clark and Relf and Chew.

Lizardi Record, vol. 1, p. 40.

As this defence is much relied upon to defeat two-thirds of complainant's claim, we shall notice it at some length.

It may be proper first to state that De La Croix does not, in his answer, set up this defence.

Ans. of De La Croix, Rec. vol. 1, p. 13–52.

The City of New Orleans, in answer to the special interrogatories, say through the mayor, "that he believes this property (property mentioned in the bill) did belong to the succession of Daniel Clark, and at the time of his death he was seized thereof."

Record, vol. 1, p. 69.

Lameyer, in his answer to special interrogatories, says of the property claimed by him, that it "was a part and portion of the estate of Daniel Clark at the time of his decease." Record, vol. 1, p. 68.

Diamond also admits, in his general answer, that the

title of the land he claims was in Daniel Clark at his decease. Record, vol. 1, p. 31.

These defendants are, therefore, estopped by their admissions under oath from setting up any other than the title of Daniel Clark.

The alleged partnership agreement is as follows:

Articles of agreement made and concluded between Daniel Clark, Esq., of this city, of the one part, and Beverly Chew and Richard Relf of second part; witnesseth,

That whereas, In the year 1801, the aforesaid Beverly Chew and Richard Relf entered into partnership for the transaction of commercial concerns in this country with Daniel W. Coxe, Esq., of Philadelphia, who had previously thereto been carrying on business in this country in company with and under the name of Daniel Clark, Esq., aforesaid, to whose affairs the house of Beverly Chew and Richard Relf succeeded; and whereas, on the 11th July, 1811, a supplementary agreement was entered into for the liquidation of said concern, fixing the profits that the aforesaid Beverly Chew and Richard Relf were to receive, and at the same time a distinct agreement was made between Daniel W. Coxe and Daniel Clark for their respective interests in the general concern, which several agreement it has, however, from the peculiar circumstances of the times and the nature of the affairs, been hitherto impossible to carry into effect, and neither can the parties at this moment contemplate an early conclusion of them, but being mutually desirous of establishing the principle of a general settlement, when it may be found practicable, have agreed as follows:

1. That in lieu of the funds stipulated in the agreement before referred to, dated 11th July, 1811, fixing the profits of Beverly Chew and Richard Relf, they do from this day commence jointly and co-equally with

Daniel Clark in all the property, debts, etc., held either in their own name or in that of Daniel Clark or Daniel W. Coxe in this country, arising from the late concern of D. Clark or Chew and Relf, a schedule of which is to be furnished by Daniel Clark and hereto annexed, saving and excepting the house occupied by Daniel Clark on the Bayou road, as well as the estate inherited from T. Wilkins, which is hereby acknowledged to be said Daniel Clark's private property; and that after payment of the debts of the concern, including those of Daniel Clark, of which there is a schedule hereunto annexed, and a final settlement and payment of the balance that may be due Daniel W. Coxe, which payment is to be made out of the general funds, then the remaining property, either of lands, debts, or other effects, to be equally divided between the parties, each one third.

2. That in order to promote the general good, Daniel Clark engages to relinquish in favor of the concern the sum of *fourteen thousand dollars*, arising from the third installment of his contract with the Navigation Company, which Beverly Chew and Richard Relf are hereby authorized to receive and apply to the use of the house.

3. That for the better conducting the affairs in future, one of the parties shall, as early as practicable, remove to some city of the Atlantic States and form an establishment of such a nature as may appear advantageous to the general concern.

4. That neither of the parties during the term of the agreement shall withdraw from the concern any funds for individual purposes other than for defraying their personal expenses, which are hereby limited to—— dollars per annum, and that upon a final settlement the amount of the respective private accounts shall be brought into view on the division of the property.

In testimony whereof, we have hereunto affixed our seals and signed our names in presence of witnesses, at

New Orleans, the nineteenth day of June, one thousand eight hundred and thirteen.

(Signed) DANIEL CLARK,
BEV. CHEW,
RICHARD RELF.

Temoins:
F. DUTILLET.
H. W. PALFREY.

It is further understood that the plantation lately purchased by D. Clark of S. Henderson, on account of which nothing has yet been paid, is to remain on private account.

To this defence we reply:

1st. Daniel Clark never signed that agreement, or if he signed the paper, it was not, at the time of his death or ever after, a valid subsisting and executed contract between him and Relf and Chew.

To prove that he did not sign the paper, complainant offers the testimony of John V. Childs, vol. 1, p. 223; Carl Augustus Schmidt, vol. 1, p. 207; John Douglas, vol. 1, p. 213; Jules Manouvrier, vol. 1, p. 217; Wm. Christy, vol. 1, p. 239; and John T. Hammond, vol. 1, p. 229.

From a comparison with a large number of the genuine signatures of Clark, they are all of opinion that Clark did not sign that agreement.

They are creditable witnesses and experts. Their testimony is positive.

The defendants have also introduced two witnesses, far less reliable, who say the signature of Clark is genuine, in their opinion.

They also introduce Palfrey, who, without being pos-

itive, *thinks* he saw Clark sign it, almost fifty years before, when he was a boy of about fifteen years.

We should say that the force of complainant's evidence upon this point was somewhat impaired by defendant's evidence on the same point, were it not for the violent improbabilities and utter inconsistencies in the situation and conduct of Clark about the period of the pretended signature, and of Relf and Chew, with the fact that Clark ever executed that agreement as a valid, subsisting and complete contract.

a. Clark's last will, made July 12, 1813, twenty-three days after the partnership agreement, in which he appoints De La Croix, Bellechasse and Pitot to wind up and settle his affairs, is inconsistent with the fact that he had, so short a time before, signed a contract that gave to Relf and Chew virtually the administration of all of his affairs, and wound them up as effectually as they well could be.

b. The fact that appears from the deposition of one of these defendants, (De La Croix, Probate Record, p. 78,) that Clark desired him (De La Croix) to conceal from Relf and Chew the fact that he was making his last will, which made a very different disposition of his property, and this too about the time that he was putting into their hands his whole estate by this agreement, is equally inconsistent.

c. By the petition for a respite, vol. 2, p. 619, offered by defendants in evidence, it appears under the oath of Relf, that Daniel Clark's estate, eight months after his death, had $420,000 in assets above his debts.

The effect of the partnership agreement was to give two thirds of that amount, $250,000, to settle a debt of $50,000 to Chew and Relf.

It is incredible that a man of Clark's intelligence and business capacity should execute such a contract.

d. It is incredible that Danl. Clark confessedly, and by defendants' own showing, in possession of property to the amount of more than half a million of dollars, should execute a contract to any human being that gave to them *the equitable title of two thirds of that property, and the sole administration of the whole*, and yet that contract be only evidenced by one paper, and that, too, given into the possession of the other party.

It would almost necessarily be executed in two parts, yet Palfrey says it was only executed in one part. Vol. 1, p. 879. He says: "I do not think that I made more than one copy," (original.) If it was in two parts, Relf must have taken it, as he had all Clark's papers. If he had Clark's copy he would have produced it in this litigation, so deeply affecting his integrity. The fact that he did not produce a duplicate of it, shows it was not made in duplicate, and the production of a single copy indicates none was ever made.

e. The conduct of Relf and Chew is still more inconsistent and irreconcilable with the theory that this agreement was an honest, valid, and completed agreement at the time of Clark's death.

From the 19th of June, 1813, this agreement was kept an entire secret to the world until it was placed upon the public records, Aug. 14th, 1838, in filing their account in the Probate Court.

It was a secret at the inventory of Clark's estate, in August, 1813. It was a secret when they petitioned for a respite, in 1814. It was a secret at the meeting of their creditors, who had a right to know out of what fund the payment of their debts was to come.

No purchaser of Clark's estate was informed of it; and more, Relf and Chew, to every vendee of Clark's

estate, *expressly warranted that no one had any claim upon the property sold, except the succession of Daniel Clark,* when they were themselves the owners of two thirds of of every piece of property sold, if this agreement then existed.

f. Daniel Clark died about two months after this paper was signed, as pretended. A set of books claimed to be opened under this agreement, were opened June 21st, 1813.

But these books were opened in the name of Relf and Chew. While Clark lived, although he must have furnished most of the capital, no stock account is entered in his name, and no credit is given to him, as a partner. Nor is there any entry in those books that indicate that he was a partner with Relf and Chew until long after Daniel Clark had been in his grave.

See books and test. of Robbins, Rec., vol. 1, p. 168.

These books show another singular feature of this partnership. When the concern is closed, Relf and Chew alone divide the profits.

Clark puts in the capital and Relf and Chew draw out the profits.

g. Relf and Chew, in their answer to the Bill of 1836, filed in 1845 (vol. 2, p. 47,) set forth that, except the "dwelling house" occupied by Clark on the Bayou Road, and the Wilkins estate by virtue of this agreement, "that all property of which Clark died possessed was, in truth and in fact, the property of said Daniel Clark, and your respondents, Richard Relf and Beverly Chew, each in the proportion of one-third part, including all species and effects and property of whatever kind the same might be, either real estate, slaves or personal property, debts, dues and demands."

But thirty-two years before the filing of that answer and within two months of Clark's death and of the creation of this pretended partnership, Relf, under his oath of office as executor, had caused to be inventoried

as the *separate and private property of Daniel Clark nearly* $200,000 *of the assets of his succession.*

Then he asserted no title under this pretended partnership. Probate Record, p. 14.

Equally inconsistent with their sworn answer of 1845 is their petition to the Probate Court in 1838, in which they state that some property was "inventoried which appeared to belong to said Clark individually," and they then account for $183,376 05 as the private and individual property of Daniel Clark, in which they claim no interest. Probate Rec., pp. 83–90.

Upon the 21st of June, 1813, two days after the pretended forming of this co-partnership, Richard Relf, by authentic act before John Lynd, declares that he is only in co-partnership with Beverly Chew.

Record, vol. 1, p. 141.

h. That this agreement was never a valid, subsisting and completed contract between Clark and Relf and Chew, even if the signature of Clark is genuine, appears on the face of the paper.

Clark was to furnish a schedule of the property embraced in the contract. This schedule was the very foundation of the contract. Yet, although Clark lived two months after, and could have done it in two days, it was never done. Nor did Relf and Chew ask for it.

i. A schedule of Clark's debts to be paid purports to be annexed to the contract, but when offered in evidence it is not annexed nor its loss accounted for; if torn off by Relf and Chew, the contract is annulled—if never annexed it is incomplete.

This schedule of Clark's debts, to be paid by Relf and Chew, is vital to the contract, especially in view of the fact that Relf and Chew, in their petition for respite, eight months after Clark's death, under oath, stated Clark's debts to be about $125,000, and when they filed their account in the Probate Court, in 1838, to explain

what they had done with his assets, they increase his debts to about $525,000.

k. The blank in that agreement, in which was to be regulated the amount each partner was to draw out, *has never yet been filled.*

l. The paper shows upon its face that Richard Relf made to that paper a material change after it purports to have been signed.

When Palfrey copied the paper there was a blank in it.

When the paper is offered in evidence, that blank is filled *in the hand writing of Richard Relf*, with the words "*fourteen thousand dollars,*" and yet the attesting witness, Palfrey, will not say that it was there when the paper was signed. Vol. 1, p. 879.

m. By defendants' admissions, Rec. p. 881, vol. 1, the words: "It is further understood that the plantation lately purchased by D. Clark of S. Henderson, on account of which nothing has yet been paid, is to remain on private account," were not upon the contract when executed. Nor was it upon the contract until after it was filed in the Probate Court in 1838, as appears from the copy then filed by Relf.

Testimony of Fagot, R. vol. 1, p. 233.

This is an important addition, in view of the fact that when Relf undertook to settle his accounts in 1841 he claimed that all of Clark's real estate, except the Bayou house and Wilkins' estate, passed into the copartnership under this agreement. But he had forgotten that he had himself, twenty-eight years before, and within one month of Clark's death, inventoried this same Henderson plantation, as Clark's private property. This little harmless addenda would explain that ugly fact. It shows at least that this paper, coming to light after being for twenty-five years in the secret custody of Richard Relf, was clothed with no additional credibilty from the honesty of its custodian.

2d. Even if Relf and Chew were now the equitable owners of two thirds of this property, it is not in law or equity competent or open to defendants to set up, in bar to complainant's bill, this outstanding equitable title in Relf and Chew, in this case and under these pleadings.

This is well settled by the law of Louisiana.

"Defendant cannot set up an outstanding title in a third person, when he claims under the same person as plaintiff."

Crane et al. vs. Marshal, 1 Mar. N. S. 578.

"The doctrine is now well settled that when parties litigating in relation to their respective rights to any specified property, trace their titles to one common source,, neither of them is at liberty to deny the title of their common author."

Bedford vs. Urquhart et al., 8 La., 239.
Trahan vs. McManus et al., 2 La., 214.
Vernett heirs vs. Candalle, 4 Mar. N. S. 402.
Hughey vs. Barrow, 4 Ann. 250.
Gerault vs. Zuntz, 15 Ann. 686.

"This is now the settled jurisprudence of Louisiana courts."

Cotton vs. Stacker, 5 Ann. 677.

That complainant and defendants both claim title from Daniel Clark, appears from the pleadings, exhibits, and the whole record.

The same doctrine is well settled, both in law and equity, by the highest judicial authority of nearly all the States, and in England, as well as by this court.

"Where both parties claim title under the same person. it is not competent to either to deny that such person had title."

Love vs. Gates et al., 4 Devereux & Battles, 363.
Ives vs. Sawyer, 4 Dev. & Bat., 51.
Norwood vs. Marrow, 4 Dev. & Bat., 441.
Ward vs. McIntosh, 12 Ohio, 239, (N. S.)
Douglas vs. Scott, 5 Ohio, 197.
Jackson vs. Ireland, 3 Wendell, 100.
LaCrosse & Mil. R. R. Co. vs. Seeger, 4 Wis. 268.
Gillian vs. Bird, 8 Iredell, 280.
Rosseel vs. Wickham, 36 Barb. 391.
Demeyer vs. Legg, 18 Barb. 14.
Ellis vs. Jeans, 7 Cal. 409.
Smith vs. Doe, 26 Miss. 291.
Dooly vs. Wallcott, 4 Allen, 409.
Smith's Leading Cases, vol. 2, p. 712, 6 Ed.
Att'y Gen. vs. The Bishop, 5 Vesey, Jr. 831.
Bowman vs. Taylor, 2 Ad. & Ell. 290.

"Where both parties claim under the same grantor, neither can set up an outstanding title in a third person to defeat each other's claim."

Addison et al. vs. Crow et al., 5 Dana, 282.
Gayle vs. Price, 5 Richardson, 525.
Johnson vs. Watts, 1 Jones, 230.
Gantt vs. Cowen, 27 Ala. 582.
Lessee of Cooper vs. Galbraith, 3 Wash. C. C. 548.

The law upon this point is well stated by the court in the recent equity suit of Garrett et al. vs. Lyle, 27 Ala. 589, as follows:

"We do not deny that in equity as well as in law, the plaintiff must recover upon the strength of his own title, but because this is the rule it does not follow he must show a good title against all the world; it is enough that he shows a right to recover against the defendants.

And there are many cases in which he has this right, although another person must recover it from him."

In Smith's Leading Cases, vol. 2, p. 775, 6th Ed., this question is elaborately discussed, and it is said "the result of the authorities, as a whole, would seem to be that those who decree title by descent or purchase from, the same source, cannot show either that the right which they have in common is defective, or that there is a paramount title outstanding in a third person."

3. These defendants are *estopped* from denying that Daniel Clark had title to the property now claimed by them, by the recitals in the deeds from Relf and Chew, as executors of Daniel Clark and attorneys of Mary Clark, to their former grantor, and by the acceptance of those deeds conveying only the title of Daniel Clark.

The remote vendor of Hennen, Slidell and Creppel was Azelie Lavigne.

Upon the 28th December, 1820, Lavigne accepted from Relf and Chew, as executors of Daniel Clark, and as attorneys of Mary Clark, a deed of the land now claimed by them, in which they recite that in consequence of a "sale by auction which they have caused to be made, in their above named capacity, of the property composing the estate of the said Daniel Clark, deceased, they sell, cede and transfer" (a lot, describing it,) "which lot of ground forms part of the property composing the succession of Clark," and they "transfer to said purchaser all the rights of ownership which the estate of Daniel Clark has or might have, to the lot of ground sold in this act," and they convey no other interest.

Translation Probate Rec., vol. 2, p. 244.

The remote vendor of Lameyer is Debon. Upon the 29th December, 1820, Debon accepted a deed from

Relf and Chew, acting in the same capacity as in the sale to Lavigne, and containing precisely the same recitals as above stated, in the case of Azelie Lavigne.

Translation P. R., vol. 2, p. 255.

The remote vendor of Diamond and Seneschal (Jenkins,) is Thomas Bonseigneur.

Upon the 5th of January, 1821, Bonseigneur accepted from Relf and Chew, acting in the same capacity, a deed of the land now claimed by these defendants, which contains the same recitals, precisely, as those above stated to be in the deed to Azelie Lavigne.

Translation P. R., vol. 2, p. 233.

The deed from Relf and Chew to Blanc, the vendor of the City of New Orleans, recites that the property sold "is a part of those lands that the said Daniel Clark bought" in 1807.

They convey no other interest except that derived from Daniel Clark.

Translation P. R., vol. 2, p. 1075.

The present defendants are therefore bound by the acceptance of such deeds with such recitals by their former vendors, and cannot controvert the title of Daniel Clark.

In Carver vs. Jackson, 4 Pet. 1, the court say :

"A recital constitutes a part of the title. It works upon the interest in the land, and creates an estoppel which runs with the land against all persons in privity."

Kearney vs. Van Rensselear, 11 How., 297.

Lessee of French et ux. vs. Spencer et al., 21 How., 240.

Smith's Leading Cases, vol. 2, p. 708, 6th Ed.

"The acceptance of a deed operates as an estoppel upon the grantee and those who claim under him, as against the grantor and his assigns and representatives."

Torrey vs. Bank of Orleans, 9 Paige, 659.

Sinclair vs. Jackson, 8 Cowen, 543.

Dunn vs. Cornell, 3 Johnson's Cases, 176.

4th. But the conclusive answer to this defence, set up by these defendants, is that no part of the property claimed by complainant in these bills, was ever embraced in the agreement of June 19th, 1813, even if it were a valid and complete contract.

We have before shown that De La Croix does not set up this defence, and that the City of New Orleans and Lameyer admit that their property belonged to Daniel Clark's succession.

Defendants set up this agreement as a substantive and distinct allegation of defence in their answer. They must prove it by evidence beyond their mere assertion.

Hart vs. Ten Eyck, 2 Johnson, 88.
Napier vs. Elam, 6 Yerger, 112.
Bank of U. S. vs Beverly, 1 How. 151.

The partnership agreement describes the property embraced within its terms as follows:

"In all the property, debts, etc., held either in their own name (Relf and Chew) or in that of Daniel Clark or Daniel W. Coxe, in this country, arising from the late concern of D. Clark and Chew and Relf."

The property claimed by Slidell and Crippel is that sold by Relf and Chew to Lavigne.

See chain of title, ante p. 45, 46.

The property claimed by Diamond and Senescal (Jenkins) is that sold by Relf and Chew to Bonseigneur. See chain of title.

Lavigne's title shows Daniel Clark bought it August 20th, 1807.

See Probate Record, p. 245.

Bonseigneur's title shows Clark bought it August 20th, 1807. Probate Record, p. 235.

Clark was, therefore, the owner in his own name from 1807 till his death, 1813.

Now the late concern of D. Clark and Relf and Chew was dissolved July 11th, 1811. This is admitted in their answer (p. 77) and proved by the agreement of dissolution offered by defendants (Record, vol. 2, p. 668), by which all the land of both concerns, D. Clark and Relf and Chew, went to Coxe and Clark, and Relf and Chew were to have $50,000 for their entire interest.

But upon the next day, July 12th, 1811, Clark and Coxe dissolve their partnership and made a settlement, by which, among other things, Clark takes all the land then belonging (1811) to both concerns, and a schedule signed by Clark and Coxe is annexed of all the lands which belonged to either the concern of D. Clark or Relf and Chew in 1811. Vol. 2, p. 425–427.

That schedule excludes all the land claimed by Crippel, Slidell, Senecal and Diamond.

The fact that Clark owned this property in 1811, and that Coxe and Clark, in their schedule of the partnership property in 1811, excluded it, makes the conclusion irresistible that it was the private property of

Daniel Clark, and not included in the agreement of June 19th, 1813, especially as they say in their act of dissolution, "but it is particularly understood that any other property held by Daniel Clark, except that enumerated in the schedule before mentioned, is and shall remain his sole and distinct property, for which he is in no wise accountable to the said Daniel W. Coxe."

Vol. 2, p. 424.

Although this defence is not open to the City New Orleans and Lameyer, we may add in relation to Lameyer that it appears, from the title of Relf and Chew to his vendor, Debon (Probate Record, p. 255), that Clark bought that estate February 24th, 1813—nearly two years after the "late concern of D. Clark or Relf and Chew" had been dissolved—and of course it could not be land arising from that concern, and therefore not under the agreement of June 19th, 1813.

It is also evident that Relf and Chew did not embrace this land of Lameyer's, under the copartnership agreement, because they sold it in 1819 for $8,000, but did not include it in the inventory of Clark's estate in 1813, nor place it upon the schedule of property shown to their creditors in 1814. Nor did they account for the money, $8,000, in their final account in 1838, either as private or partnership assets.

They sold it, took the money, and never to this day accounted for it to heir, creditor, court or stranger.

XVII.

TENTH DEFENCE.

The tenth defence set up by each of these defendants is, that they are bona fide purchasers for a valuable consideration without notice.

This defence is set up, or rather alluded to, in the separate answer of each defendant, by which they claim they are the "especial favorites of a court of equity." Lizardi Record, vol. 1, p. 39.

1st. Our first reply to this defence is that no one of these defendant's have made and set forth those allegations which are essential to make this plea available to them.

The plea is not well pleaded. Although by Rule 39 of this court, in Equity, a defendant is allowed to avail himself of the protection of this plea by way of answer, yet that does not dispense with making the necessary averments in his answer which would be essential in a plea.

"In order to make it a good bar it is necessary that it should aver that the whole consideration of the purchase had been paid before notice of plaintiff's title. Lord Redesdale says: "It (the plea) must aver the consideration and actual payment of it, a consideration secured to be paid is not sufficient, and he is fully borne out by the authorities. Hardingham vs. Nichols (3d Atk. 304) is directly in point, and indeed the doctrine has passed into a common axiom of equitable jurisprudence."

Wood vs. Mann, 1 Sum. 510.

In Boone vs. Chiles, 10 Peters, Leading cases in Eq., vol. 2, page 62, (3d American Ed.,) 210, this court have set forth the essential averments of this plea, among which are, that "the consideration must be stated with a distinct averment that it was bona fide, and truly paid."

"Notice must be denied previous to and down to the time of paying the money, and the delivery of the deed."

Now it appears from the answer and exhibits of the city of New Orleans, that they purchased in 1834, and gave their bonds, due in thirty years, to wit: in 1864. *They do not deny notice before payment of these bonds*, and if they did it would not be true, as this suit was brought in 1856, eight years before they paid. Any payment after that was at their peril. Neither are they *purchasers;* they have title by *operation of law* from Municipality No. 1. Ans. of N. O., vol. 1, p. 24–25.

It is a settled rule in equity that a purchaser without notice, to be entitled to protection, must not only be so at the time of the contract, but *at the time of the payment of the purchase money.*

Wormley vs. Wormley, 8 W. 421.

"Notice before actual payment of all the money, although it be secured, and the conveyance actually executed, is equivalent to notice before the contract."

Sugden's Law of Vendors, ch. 23, sec 2, No. 11, 14th English edition.

Lameyer, by his answer and exhibits, shows that he bought this property and bank stock; that he paid part cash and gave his notes for the balance; that the cash paid was not so much as the bank stock he bought was worth; so that he could have fully protected himself before payment if he had notice; *yet he does not deny notice before payment.*

Ans. of Lameyer, vol. 1, p. 23 and 24, No. 5, p. 807.

De La Croix does not even aver the payment of a "valuable" consideration. "*Good, and lawful, and full*" are the words used. It also appears from his answer and exhibits that he paid by offsetting a claim

against the executors which is clearly bad. De La Croix, Rec. vol. 1, pp. 20–21.

John Diamond, by his exhibit and answer shows that he gave a note for a portion of the purchase money, and yet does not aver want of notice before paying it, but expressly admits notice of complainants' claim before he took his deed.

Ans. of Diamond, R. vol. 1, p. 31–39–384.

Jenkins (Senecal) is not even a *purchaser for value*, having received by will (bill of Revivor, vol. 1. Record, 961) and Senecal from whom she received by will expressly admits notice in law of complainants' claim.

Lizardi R., vol. 1, p. 39.

Wm. Creppel does not aver a purchase for a valuable consideration, but for a "*full, fair and adequate*" consideration, and by his exhibits he shows a partial payment, by assuming debts, and *distinctly admits that before he bought he stood charged in law with notice of complainant's claim.* Record, vol. 1, pp. 39, 399.

Slidell adopts the answer of Creppel, and thereby makes the same admission of notice.

Record, vol. 1. p. 936.

We, therefore, respectfully submit that these "especial favorites of a court of equity" have not brought themselves by their pleadings within reach of its protection.

2d. But the fatal objection to this plea is that *they are all purchasers with notice.*

We will show hereafter how each defendant particularly is affected with notice at the time of his purchase. It will be sufficient here to say, that the city of New Orleans had distinct notice of complainant's claim, their

present title having come from Municipality No. 1, in 1848 and consequently they were purchasers "pendente lite," as the suit of 1836 was then pending, both against themselves and their grantor. It is not true, then, that they are purchasers without notice.

Record, vol, 1, p. 25.

Lameyer was a purchaser from Petipain in 1836, after Petipain had been cited in the bill of 1836. He, too, was a purchaser *pendente lite*, and by the plainest rules of equity was a purchaser *with notice*.

(Chain of title, ante pp. 45–46.

De La Croix had actual notice, as we have abundantly shown, and particularly was he bound to know that Relf could not sell him slaves as executor, at private sale, and therefore he is not a bona fide purchaser.

3d. But even if the plea were well pleaded and true, in point of fact, it is not available to these defendants against complainant, *who relies upon a paramount legal title.*

The plea of bona fide purchaser without notice properly applies only to a case where complainant by the bill seeks relief founded upon an *equitable title* against the purchasers of the *legal estate* without notice of the equity. "This doctrine applies strictly in all cases *where the title of the plaintiff seeking relief is equitable.*"

Story Eq. Pl. sec. 604.
Story Eq. Juris., sec. 64, vol. 1.

The question, however, whether this plea can be set up against the legal title is one upon which there has been a great diversity of opinion, both by text writers and courts of equity.

The history of this question in the High Court of Chancery in England, presents one of the most striking

instances of judicial contradictions and uncertainty known to jurisprudence.

The best reported among the earliest cases is Basset vs. Nosworthy, (Finch 102,) in which Lord Nottingham, then lord keeper, allowed this plea against one seeking a discovery in aid of a legal title. This was in 1673.

Eight years after this, in 1681, in Rogers vs. Searle, (2 Freeman, 84,) the same lord keeper (Nottingham) directly overruled the case of Basset vs. Nosworthy, and held, that "where the plaintiff hath *a title in law*, then though the defendant doth purchase without notice, yet he shall discover writings, but otherwise it is, if the plaintiff hath only *a title in equity.*"

The question next arose in Williams vs. Lambe, (3 Brown, Ch. R. 264,) in 1791, when Lord Chancellor Thurlow, following the case of Rogers vs. Searle, held that this plea would not avail against a legal title "it being only a bar to an equitable, not a legal claim.'

But in 1794, in the case of Jerrard vs. Saunders (2 Vesey, p. 454,) Lord Thurlow's position in Willlams vs. Lambe was overruled by Lord Loughborough, and this plea was held to be good against one claiming a legal title.

But two years later, in 1796, in Strode vs. Blackbane, (3 Vesey, p. 221,) Lord Chancellor Loughborough overruled his own decision in Jerrard vs. Saunders, and disallowed the plea to a legal title.

This was followed in 1803 by the case of Wallwyn vs. Lee, in which Lord Chancellor Eldon overruled Strode vs. Blackburne, and heldthe plea good against one claiming a legal title. (9 Ves. Jr., 24.)

Again in 1830 the doctrine of the case of Jerrard vs. Saunders, and Wallwyn vs. Lee, was set aside by Sir John Leach, master of the rolls, in the case of Collins vs. Archer, (1 Russ. & Mylne, 284,) who held, with the case of Williams vs. Lambe, that the plea of bona fide purchaser without notice, *would not avail against one holding the legal title.*

This decision of Sir John Leech was overruled in 1845, by Lord Chancellor Sugden, in Joyce vs. Moleyns, (2 Jones and La Touche, 374,) who held the plea good against the legal title.

The same doctrine was again affirmed by Sir John Romily, in 1853, in the case of the Attorney General vs. Wilkins, 17 Beavans, 285.

As yet, no one had ever questioned but that this plea was always available against one claiming *an equitable title.*

But, in 1862, in Phillips vs. Phillips, (8 Jurist, N. S. 145,) Lord Chancellor Westbury held that this plea was not good in all cases, *even against the holder of the equitable title.*

He also made this important distinction, that this plea will not avail against the legal title, *"where the court exercises a legal jurisdiction concurrently with courts of law," and the court was not asked to give equitaelb relief alone as distinguished from legal relief.*

Lord Westbury's decision is very important in the history of this question, and seems to reconcile many of the apparent contradictions in former cases.

In this country, the decisions, although not uniform, seem to be against the validity of this plea as against the paramount legal title.

Snellgrove vs. Snellgrove, 4 Desaussures, 272.

The chancellor, speaking of this plea, says:

When the title to be set up is an equitable one, it seems reasonable that the court should not give its aid againt the title of a fair purchaser. But when the complainant comes with a legal title, I do not perceive how he can be refused the aid of the court."

Hughes vs. Graves, 1 Littell 319.

Daniel et als. vs. Hollingshead, 16 Geo. 194.

Wood vs. Mann, 1 Story, 509.

Taylor vs. Stone, 2 Mumford, 314.

Hurst's Lessee vs. McNeil, 1 Wash. C. C. R. 79.

"Though equitable rights may, in favor of fair bona fide purchasers for valuable considerations and without notice, be lost by a sale, legal rights never can unless there be fraud."

Hooe vs. Harrison, 1 Wash. 212.
Larrone vs. Beam, 10 Ohio, 498.
Blake vs. Hevyward, 1 Baily, 221.

The Court say:

"The plea of purchase for a valuable consideration without notice, can never prevail against a legal title."

In this Court, this precise question has not been directly decided, although it seems to assume that the plea is available only against an equitable title, by the holder of the legal title.

"The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate, and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of a title. They fully apply only to the purchaser of the legal estate."

It is not enough that he purchased what he supposed was the legal title.

Vatter vs. Hinde, 7 Pet. 271.

"The title purchased must be apparently perfect—good at law—a vested estate in fee simple."

Boone vs. Chiles, 10 Pet. 211.
Kerr vs. Watts, 6 Whea. 560.
Hallet et al. vs. Collins, 10 How. 184.

In Wood vs. Mann, 1 Sumner, 509, Story, Justice, says:

"There may be good ground to refuse a discovery against such a purchaser when the title must be maintained for relief.

"And there may also be good ground not to interfere

with such a purchaser so far as to take from him any paramount legal title which he has honestly obtained, and yet when that title is not paramount to the legal title of the plaintiff, to give him full relief."

Apparently, in accord with these views of that eminent American equity author, Story, Lord Chancellor Westbury, in the latest decision in the English High Court of Chancery (Philips vs. Philips), adopts as the law of that Court, that when a court of equity exercises a legal jurisdiction concurrently with courts of law, and is not called upon by the bill of complainant solely to give equitable relief, as distinguished from legal relief, then the plea of bona fide purchaser, for valuable consideration without notice, will not avail the defendant against that portion of the bill that asks for legal relief founded upon the paramount legal title.

This court exercises concurrent jurisdiction in equity or in law.

We respectfully submit that the rule that should govern this court, in relation to this plea, is this:

When a complainant in his bill founds his claim upon the paramount legal title, and under proper averments asks the auxiliary aid of this court, through its peculiar equity powers, to aid in establishing that title, then, if the defendant interposes the plea that he is a purchaser for a valuable consideration without notice, and it is true, this court will refuse to aid in the establishment of complainant's title by its peculiar equity powers, as discovery, injunction, surrender of title papers, etc.,

but give him in that bill such legal relief as he, unaided by equity, shall show himself entitled to.

XVIII.

The eleventh defence set up by all these defendants, except Slidell and De La Croix, is that they are purchasers from bona fide purchasers without notice for a valuable consideration.

This defence is very loosely made upon page 39, Lizardi Record.

To this we reply that

1st. There is the same defective averments as to their immediate vendor's title, under whose title they seek protection, that there is as to their own title in respect to notice before payment, and as to the fact of being a purchaser for a valuable consideration without notice.

The City of New Orleans took their present title from Municipality No. 1, but Municipality No. 1 was not a purchaser for a valuable consideration, having derived title by operation of law

Answer of City of N. O.

"The plea of purchase for a valuable consideration without notice, cannot be set up by one who holds under a voluntary conveyance."

Story Eq. Pl. sec. 811.
Beames Pl. in Eq. 246.

Lameyer does not allege that his vendor, Pettepain, was a purchaser without notice of complainant's title.

Answer of Lameyer.

Crippel's vendor was Grabriel, but he purchased

from Boutin in 1846, while the bill of 1836 was pending against him or his vendor, and was therefore a purchaser with notice. Ante p. 45, 46.

Diamond purchased of Roderiguez, who was a purchaser from Minturn in 1848, while Minturn was a defendant in the bill of 1836, and therefore a purchaser with notice. Ante p. 45, 46.

Jenkins derived title from Senecal, but Senecal was a purchaser *pendente lite* from Wid. Ambrosie, and effected with notice of complainant's claim.

Ante p. 45, 46.

These facts are conclusive upon the claim to the equitable consideration of the court made by these defendants, not on account of their own equity, but for that of their vendors.

XIX.

TWELFTH DEFENCE.

They claim that complainant's demand is barred by prescription.

This defense is set forth in the most general terms.

Lizardi Record, vol. 1, pp. 21-72.
De La Croix Record, vol. 1, pp. 16-46.
City of N. O. Record, vol. 1, pp. 15-56.

This defence is much relied upon by defendants, to defeat complainant's demand.

We will therefore take up the title of each defendant, and show how entirely insufficient is this defense to resist the claim of complainant.

The prescriptions set up in defense are:

1st. The prescription of five years against the action for a reduction of donations. C. C. Art. 3507.

This prescription of five years does not apply, as this is not an action for a reduction of excessive donations.

2d. The prescription of ten years against one claiming a vacant succession.

This prescription does not apply to this case, for the reason that Clark's succession was never a vacant succession.

If it ever was vacant, it was between Clark's death in 1813, and 1825, while the code of 1808 was in force. The Old Code of 1808 defines what is a vacant succession, p. 172, Art. 118: "An estate is said to be vacant when no person claims its possession, either as an heir, or under any other title." They are administered by curators appointed by the Judge.

The whole record shows that no curator ever was appointed to this, as a vacant estate. Mary Clark was claiming it by some title. The very titles exhibited by the defendants themselves as the foundation of their own title, show that Mary Clark, and Relf and Chew, were claiming this estate UNDER SOME TITLE, *no matter how invalid,* from the day of Clark's death to 1825.

In Gaines vs. Hennen, 24 How., in deciding upon this issue, the court say:

"There being no vacant succession in this case, the ten years prescription does not apply."

3d. The prescription of 30 years to bar the faculty of accepting an inheritance or succession.

C. C. Art. 1023.

This prescription of thirty years will not avail the

defendants, because within the thirty years after Clark's death, in 1813, to-wit—in 1834, this prescription was interrupted, and before the 30 years had elapsed which began to run again in 1835, complainant formally accepted the inheritance, and took possession of it, by the probate of the will of 1813, by the Supreme Court of Louisiana in 1855.

Art. 1023 of our Civil Code is identical with Art. 789 of the Code Napoleon. The French commentators, including Marcedé, Delaporte, Malville, Vazeille, Duranton, and Malpel, have differed widely as to the meaning of this article; but it has, in a late case in Louisiana, been the subject of elaborate discussion, and a construction given to it which is now the law of Louisiana. In that case, Succession of Waters vs. Zacharie, 12 Ann., p. 97, the court say:

"We therefore conclude that the legislature intended to declare, in one part of the article, that if he who is called to an inheritance is silent for thirty years and does no act evincing his acceptance of the succession, he is barred by prescription."

Was complainant silent for thirty years? Did she not do acts evincing her acceptance of Daniel Clark's succession? She brought suit, for this very succession, in 1834, and for the property in 1836, within twenty-one years after Clark's death.

This is distinctly alleged in the bill, and not only not denied by defendants, but specially admitted in the answer of each one.

This constitutes a clear interruption of this prescrip-

tion, in accordance with the decision of Waters vs. Zacharie, 12 Ann. 97, and Art. 3484 C. C., which is as follows :

A legal interruption takes place when the possessor has been cited to appear before a court of justice, on account either of the property, or of the possession; and the prescription is interrupted by such demand, whether the suit has been brought before a court of competent jurisdiction or not.

Prescription once interrupted, does not begin to run again until the suit is ended; and requires the full 30 years afterwards.

"Prescription having once been interrupted, the previous time could never after be computed to acquire a right by prescription."

Buden vs. Buhun, 4 Ann. 470.
Baker vs. Thomas, 4 La., 418.

This suit of 1834 was ended June 8th, 1836, (see bill,) and before 30 years had elapsed she accepted, or evinced her acceptance of the succession in 1855, by proving the will of 1813, (Probate Record.)

But defendants say complainant did not interrupt this prescription of 30 years, by the suit of 1834, because she abandoned that suit, and they evoke the authority of Art. 3485 of the Civil Code : "If a plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened."

In Record, vol. 2, p. 777, we find how that suit of 1834 was discontinued. It was brought against Eleanor O'Bryne et als., claimants for the succession under the will of 1811, through Mary Clark. Claimant had taken a rule for the production of material papers. The

court, to the surprise of complainant, refused to order them. Complainant then asked a continuance, so as to prepare evidence to try the case without them. The court refused the continuance, because Relf's character was involved. Complainant could not proceed, *at that time*, and thereupon the following order was entered :

On motion of the defendant,s plaintiffs are non-suited, they paying the costs of this suit.

June 8th, 1836. J. BERMUDEZ, Judge.

These facts, so far from showing that complainant abandoned her demand, or discontinued her suit, show directly the reverse—that she still pressed her demand, and desired to continue her suit, asking only for time to properly present it.

Defendants, not complainant, asked for the non-suit.

The construction put upon Art. 3485, by the courts of Louisiana, shows most clearly that such a state of facts is not an abandonment of her demand, so that the interruption of prescription "shall be considered as having never happened."

In Wilson vs. Marshal, 10 Ann. 331, the court say that "it contemplates a voluntary, intentional, active abandonment."

The case of Dunn et al. vs. Kenny, 11 Rob. 250, presents facts almost exactly like the present case. Plaintiff was not ready with his evidence. Defendant insisted upon trial, and a non-suit was entered. The court say : "We conclude, from all the circumstances in the case, that the plaintiffs, having failed in obtaining their evidence in time for a trial, which was urged by the opposite party, were not able to make out their case, and that the court ordered it to be dismissed as in case of a non-snit, and that under such circumstances they

ought not to be regarded as having voluntarily abandoned their base, in the article 3485, of the Crde."

See also, 7 Ann. 523. 8 Ann. 469.
10 Ann. 327. 12 Ann. 672.
14 Ann. 692. 3 La. 274.
17 La. 213.

Upon these facts, and the law applicable thereto, this court, in Gaines vs. Hennen, decided that this plea of thirty years prescription would not avail the defendants.

4th. The fourth species of prescription relied upon by defendants, is that of ten years to prescribe a title against persons residing in Louisiana claiming that title, and twenty years against absentees.

C. C., Art. 3437, as follows:

"Immovables are prescribed for by ten years between persons present, and twenty years between absentees, when the possessor has been in good faith, and held by a just title during that time."

This prescription requires in the possessor good faith and a title translative of property. C. C., Art. 3445.

It does not run against minors. C. C., Art. 3488.

Complainunt alleges in her bill that she was a minor until Dec. 31, 1827. Each of the defendants admit that she was a minor until June, 1824. (De La Croix's answer, vol. 1, p. 29, adopted by all the defendants.) For the purposes of this argument we will take complainant's minority as ending in June, 1824, and this prescription then begins to run.

The longest period, twenty years, only is applicable to this case, prior to 1848, as complainant was absent from Louisiana almost from her birth, and never resided

there. This is proved by the testimony of Col. S. B. Davis, Record, vol. 2, p. 390, 391, and also by the allegations of the bill, which are not denied by defendants.

Now, we say, with these general facts, and the law as stated, that this plea of prescription cannot avail any of these defendants, because, as to each one of them this prescription was interrupted before it became complete, by the suit of 1836, which suit ended in 1852, and that the prescription that then began to run, was again interrupted by the present suits in 1857. C. C., Article 3484.

We will make a particular application to each defendant.

SLIDELL.—CREPPEL.

(a.) Each of these defendants derive title from the Carrollton railroad. (See chain of title, ante pp. 45–46.)

(b.) The Carrollton Railroad owned the property now claimed by defendants at the time of filing the bill of 1836, July 28, of that year, being the owners from 27th May, 1836, to May 30th, 1844). Chain of title, ante pp. 45–46).

(c.) They were party defendants to that bill and cited to appear on account of that very property. (See Bill, Record, vol. 2, p. 1. (See demurrer of Carrollton Railroad Co., vol. 1, page 346 to 350, filed Nov. 12th, 1841.)

(d.) This fact is also proved by being alleged in the bill, vol. 1, p. 6, and admitted in the answer of each defendant, in which they say, "True it is, that such a suit as complainant refers to in her present bill was instituted by her and her then husband, Wm W. Whit-

ney." (Crippel's answer, also adopted by Slidell, vol. 1, p 52.)

(e.) That suit (bill of 1836) was ended April, 1852, alleged in the bill and not denied in the answer, and 12 How., p. 472.

(f.) The present bill was filed March 27th, 1857, five years after, and defendants cited Creppel March 28th, 1857—vol. 1, p. 952; Slidell, 2d April, 1857—vol. 1, p. 953.

This interruption of prescription, therefore, as to these defendants, is complete—the first being in 1836, against the Carrollton Railroad, 12 years after it began to run, from June, 1824, the time of complainant's majority, and the next interruption, in five years after it again began to run, in 1852, to-wit—in 1857.

JOHN DIAMOND.

(*a.*) This defendant derived title through John Minturn. (See chain of title, ante p. 45–46.)

(*b.*) John Minturn owned from March, 1836, to March, 1848. (See same.)

(*c.*) John Minturn was made defendant in the bill of 1836, and cited to appear on account of the property claimed by this defendant. See bill of 1836 (vol. 2, p. 1; see Demurrer of Minturn, filed March 12, 1841, vol. 1, p. 349–350).

(*d.*) This is also proved by being alleged in this bill (vol. 1, p. 6) and not denied but expressly admitted in his answer, in which he also says, "true it is that such a suit as complainant refers to in her present bill was instituted by her and her then husband, Wm. W. Whitney. (See Diamond's answer, vol. 1, p. 52).

(e.) That suit (bill of 1836) was ended April, 1852, (alleged in the bill and not denied in the answer.)

(f.) This present bill was filed March 27th, 1857, five years after, and Diamond cited March 30, 1857, (vol 1, p. 955). The interruption of prescription as to this defendant, therefore, is complete, being the same as Slidell and Creppel.

SENECAL (JENKINS.)

(a.) This defendant derives title through Marie T. Moise, alias Widow Ambrosie (Chain of title, ante pp. 45 and 46).

(*b.*) Widow Ambrosie owned from March 30th, 1836, to 24h Jan., 1852. (Same).

(c.) Widow Ambrosie was, under the name of Jean B. Ambroise, made a party defendant to the bill of 1836 and cited on account of this identical property. (See bill, vol. 2, p. 1 ; see, also, her answer to the bill, vol. 2, page 89.)

(d.) This fact is also proved by being alleegd in this bill, vol. 1, p. 6, and not denied but expressly admitted in the same words as used by Diamond and others: "True it is," etc. See answer of Senecal, vol. 1, page 52.

(e.) That suit was ended in 1852, (Proof same as Diamond.)

(f.) This bill was filed March 27th, 1857, and Senecal made party defendant—(Jenkins coming in by bill of revivor, vol. 1, p. 952.)

The interruption of prescription as to this defendant, too, is complete in the same way as in Diamond and others.

Slidell, Crippel, Diamond and Senecal each admit that their possession was interrupted in 1836 ; in their answer, p. 45, vol. 1, where they say, speaking of their possession, that "it has never been disturbed or inter-

rupted except by an abortive attempt of the complainant and her husband, in 1836, by their bill aforesaid."

LAMEYER.

(*a.*) Lameyer derived title through Pettipain, (chain of title, ante 45–46).

(*b.*) Pettipain owned the same property now claimed by Lameyer from May 20th, 1833, to Sept. 30th, 1836, (ante, pp. 45–46).

(*c.*) Pettipain was made a party to bill of 1836 and cited to appear, on account of this very property, Aug. 13th, 1836. See bill of 1836—vol. 2, p. 1—and citation to Pettipain—vol. 1, p. 255.

(*d.*) Lameyer was also made a party by his petition filed 2d Feb. 1846, vol. 1, p. 493.

(*e.*) This is also charged in the bill, vol. 1, p. 1, and admitted in Lameyer's answer, vol. 1, p. 43, in which he says: "The complainant and her then husband, Wm W. Whitney, in the year 1836, filed in this Hon. Court their original bill on the equity side, and numbered 122, in which she set forth," etc.

(*f.*) This suit was ended in 1852. (Charged in bill and not denied in the answer.)

(*g.*) This present bill was filed Dec. 22d, 1856, and Lameyer cited June 2d, 1857, vol. 1, p. 10.

There is, therefore, the same interruption of prescription as to this defendant, to-wit: in 1836—after running 12 years, and in 1857, after running five years.

CITY OF NEW ORLEANS.

a. This defendant appears by the chain of title—ante pp. 45–46—to have been the owner of the property now claimed by her, from Sept. 26th, 1834, except a certain period from 1836 to 1848. She says in her an-

swer that her title passed to Municipality No. 1, but does not state the day and month.

She is estopped by the pleadings in this case from denying that she was owner at the time of filing the bill of 1836, and the service of process upon her, because it is charged in the bill "that in 1836, July 28th, suit was brought against her for this property," and that "in 1821 she illegally took possession of this property and has ever since held it." The only denial of this allegation is in this way—that the Mayor, Aldermen and inhabitants of New Orleans purchased this property Sept. 26, 1834; that *subsequently* that corporation was dissolved by public law, and the property vested in Municipality No. 1.; that *subsequently* to that, Municipality No. 1 was dissolved, and the property vested in the city of New Orleans, without giving any dates:—Answer of New Orleans, vol. 1, p. 25. By the well known rules of equity pleading, a fact well alleged in tbe bill, and not specifically or by necessary implication denied in the answer, is taken to be true. She was, therefore, in possession in 1836, when the bill was filed and she was cited. She also appeared to said suit in taking testimony, Feb. 6, 1837, by J. J. Mercier, attorney. See cross interrogatory to Bellechasse et als., vol. 2, p. 232, showing she was owner then.

(*b.*) The City of New Orleans were made defendants to the bill of 1836, and cited to answer on account of this property. See bill, vol. 2, p. 1, and citation served Aug. 13, 1836, vol. 1, p. 253; and all this is admitted in defendants' answer, vol. 1, p. 43.

Where they say "complainant and her then husband, Wm. W. Whitney, in the year 1836, filed in this Hon. court their original bill," &c.

(*c.*) That suit was ended in 1852. (Charged in the bill and not denied, and thus proved.)

(*d.*) The present bill was filed Dec. 22, 1856, and

the City of New Orleans cited Dec. 23, 1856. Vol. 1, p. 10.

There is, therefore, the same interruption of prescription as to the City of New Orleans, to-wit: in 1836, after running twelve years, and in 1856, after running five years.

We have thus conclusively shown that as to all these defendants, except De La Croix, this particular plea of prescription—that of twenty years to prescribe a title by adverse possessions, will not avail defendants, because we have shown by the code that it does not run against minors—by their admissions that complainant was a minor till June, 1824—by their admissions and evidence that she was an absentee, and therefore the twenty years only apply to this case—by the record and their admissions that this prescription was interrupted within twelve years, in 1836, and so continued till 1852, and that it was again interrupted in 1856–57, and continues so till now.

In the argument, thus far, we have assumed that they were *possessors in good faith*, which is essential to this plea, but we will now show in connection with De La Croix's plea that after 1836, they were all possessors *in bad faith*, and that the only prescription available to them is that of thirty years, if, indeed, any prescription unaccompanied with laches on the part of complainant is available to them in an equity proceeding.

DE LA CROIX.

As to this defendant, possession for one-half of the time required as to the other defendants, will support

this plea, which in the present case is ten years, if *he is a possessor in good faith*, and fifteen years if a possessor in bad faith.

C. C., Art. 3439. The property of slaves is prescribed for by one-half the time requisite for the prescription of immovables.

C. C., Art. 3444. The property of slaves is acquired in five years, between parties residing in the State, and ten years when any of them reside out of the State, where the possessor has a title and holds in good faith.

He was made a party defendant to the bill of 1836, and cited on account of this property, Aug. 13, 1836. See bill in this suit, April 10, 1856, vol. 1, p. 9 ; vol. 2, p. 1, and citation ; vol. 1, p. 255, which ended in 1852, and he was cited. He admits by his answer, the suit of June 18, 1834, to annul the will of 1811, &c. He admits complainant was a minor till June, 1824, without specifying the day. As he relies upon ten years possession after complainant became of age, the burden of proof is on him. We have the right to say, upon his admission, that she became of age the last day of June, 1824. We therefore interpose the suit of June 18th, 1834, as an interruption of this prescription. It was asserting a claim to this property. It was an attack upon his title, and although it may not be technically, at law, a citation to him, yet is sufficient in equity to interrupt his prescription.

But, however this may be, certain it is that this plea cannot avail De La Croix, because he is a possessor in *bad faith*, and cannot prescribe by less than fifteen years uninterrupted adverse possession.

C. C. Art. 3465.

The fifteen years prescription, commencing June, 1824, was interrupted at the end of twelve years, by citation, Aug. 13, 1836, and again, by citation in this

suit, April 10, 1856, after running about four years from April, 1852.

We will now show that De La Croix and all other defendants, are *possessors in bad faith.*

This is important, not only upon the question of prescription, but upon the question of "civil fruits," rents and profits, and increase of slaves, in the event of complainant being entitled to a decree in her favor.

The articles of the code upon this subject are as follows:

Art. 494. The produce of the thing does not belong to the simple possessor, and must be returned with the thing, to the owner who claims the same, unless the possessor held it bona fide.

Art. 495. He is a bona fide possessor, who possesses as owner, by virtue of an act sufficient in terms to transfer property, the defects of which he was ignorant of. He ceases to be a bona fide possessor from the moment these defects are made known to him, or are declared to him, by a suit instituted for the recovery of the thing, by the proprietor.

Art. 3414.—The possessor in good faith is he who has just reason to believe himself the master of the thing which he possesses, although he may not be in fact, as happens to him who buys a thing which he supposes to belong to the person selling it to him, but which in fact belongs to another.

Art. 3415.—The possessor in bad faith is he who possesses as master, but who assumes this quality when he well knows that he had no title to the thing, or that his title is vicious and defective.

(*a*) The law of Louisiana in respect to the good faith and bad faith of possessors, so far as the question of prescription and "civil fruits" (rents, profits and in-

crease of slaves) is concerned, as laid down in the Code and illustrated by the decisions of her courts, is this:

Actual good faith is absolutely necessary, but actual good faith alone will not suffice, legal good faith is necessary. A person may be a possessor in actual good faith, and at the same time be a possessor in legal bad faith, as in the case of illegal sales whose illegality is unknown, and in the case of constructive notice.

The law is clearly enunciated by the court in McClusky vs. Webb, 4 Rob. 205.

Good faith is an essential requisite, and must have existed at the commencement of the possession. (Civil Code of 1808, p. 488, art. 72.) It is good faith alone which, in the eye of the law, purifies the title of its defect, and causes the possessor under a just title to be preferred to the true proprietor, who has remained so long silent and neglectful of his rights. But it is said that the good faith required by law, consists only in the belief that the person whose right we acquire, was really the true owner of the property sold. (Civil Code, art. 3446, 3414.) This belief is certainly indispensable to constitute good faith in the purchase, but even where it exists there may be bad faith on the part of the latter; when, for instance, he has acquired, as in the present case, in violation of a prohibitory law. In such a case he knows the vices of his title as much as if it were a defect of form apparent on its face, for he cannot plead ignorance of the law. He cannot believe himself to be truly the owner of the property; he cannot have that *justa opinio quæsite dominii* necessary to prescribe. He is not, according to article 495, that bona fide possessor, who possesses as owner by virtue of an act sufficient in terms to transfer property, of the defects of which he was ignorant.

1st. As to De La Croix, the possession of the fifty-five slaves under the sale of 11th December, 1813, from Relf by private contract, is clearly and beyond all doubt in bad faith. and not by a just title. He knew, by the laws of Louisiana, Relf could not sell as executor at private sale. Code of 1808.

"A sale by a tutrix of the minor's property without a compliance with the legal formalities, is not a just title.

Françoise vs. Dalaronde, 8 Mar. 629.

Possession under a sale not made according to law is possession in bad faith, for he knows the vices of his title, and this even if he acted in good faith.

McClusky vs. Webb, 4 R. 201.

To support prescription then as to these slaves, fifteen years adverse possession without interruption is required, which we have shown does not exist.

As to the possession of twenty-three slaves, under the sale of October 16th, 1813, although made under the forms of law—that possession is in bad faith, because, from the testimony of Bellechasse, Smith, Boisfontaine and De La Croix himself (Ante, p. 98,) he knew that the will of 1811, under which he bought, had been revoked and was utterly void. He knew that he, himself, and not Relf, was the executor of Clark's last will. He knew that Mary Clark had no title, and that Myra Clark Gaines, the complainant, was sole legatee and rightful heir of the slaves he bought, and that he was her tutor.

Possession under such circumstances comes precisely

under the terms of a possessor in bad faith, as defined in article 3415, Civil Code, "who well knows that he has no title to the thing, or that his title is vicious and defective," and he fails entirely to show a just title, as defined in C. C. art. 3450, as derived from "a person whom he honestly believed to be the real owner."

To support the plea of prescription as to these slaves, it requires fifteen years uninterrupted possession, which we have shown does not exist.

The City of New Orleans was a possessor in bad faith from the day of her purchase, September 26th, 1834, because she had notice of the defects in her title by the suit of June 18th, 1834, and by the very act that gave title from Blanc, in which Blanc, in describing this land and giving the source of his title, says: "By an act of 13th October, 1821, before P. Pedesclaux, then a notary of this city, the said testamentary executors of the said Daniel Clark, sold to the said Evariste Blanc" this property.

Translation, vol. 2 p. 1084.

Here was notice, clear and distinct, of a title from Relf and Chew after their functions had closed as executors, as we have shown. Certainly by art. 495, C. C., "she ceased to be a bona fide possessor from the moment these defects were made known to her by a suit instituted for the recovery of the thing by the proprietor," to wit: August 13th, 1836.

"The general rule is that whatever is sufficient to put the party upon an inquiry, is good notice in equity."

Lord Hardwicke in Smith vs. Low, 1 Atk. 490.

"In all cases where a purchaser cannot make out title but by a deed which leads him to another fact, whether by description of the parties' recital or otherwise, he shall be presumed cognizant thereof, for it is *crassa negligentia* that he sought not after it."

Sugden Law of Vendors, ch. 24, sec. 1, No. 45.

3 Am. Ed. Leading Cases in Eq., vol. 2, p. 160, and case cited.

Whatever is notice enough to excite attention and put the party on his guard, and call for enquiry is aiso notice of everything to which it is afterwards found that such inquiry must have led, although it was unknown for want of the investigation."

Lord Brougham in Kennedy vs. Green, 3 Mylne and Keen, 719.

Leading Cases in Equity, vol. 2, p. 170.

"*Lis pendens* is of itself notice to a purchaser," and "a bill to establish a will is a sufficient *lis pendens*."

Sugden Law of Vendors, chap. 24, sec. 1, No. 10, 14th Eng. Ed.

Garth vs. Ward, 2 Atk. 174.

4th. Slidell and Crippel are possessors in bad faith, actual or legal, from the day of their purchase, Slidell October 30th, 1844, and Crippel 11th March, 1847, being purchasers direct or through mesne conveyance from the Carrollton Railroad, who, at the time of the sale, were parties defendant to the bill of 1836, and they are affected with all the notice the Carrollton Railroad had of defects in their title as purchasers *pendente lite*.

5th. Senecal (Jenkins) is a possessor in bad faith, actual or legal, from the day of his purchase, June 24th, 1852, being a purchaser *pendente lite* from Wid. Ambrosie, a defendant to the bill of 1836.

6th. John Diamond was a possessor in bad faith from the day of his purchase, June 10th, 1854, being

affected by the notice of defects in his title given to his grantor, John Minturn, by the bill of 1836.

We, therefore, most respectfully submit that the decision upon this point in Gaines vs. Hennen, in which the court say: "The prescription of twenty years does not exist," "and that the prescription which had begun to run had been legally interrupted on the 28th July, 1836, the date of her first bill," and "from that time there was a legal interruption of the prescription of twenty years which defendants have pleaded," is fully and abundantly supported by the law and facts of this case.

In what we have thus far said upon the question of prescription, we have assumed that a court of equity, in giving relief to its suitors, will be bound by the positive enactments of State laws, in relation to legal proceedings. But we respectfully submit that such is not the doctrine of equity. The test of equitable relief is rather the staleness of the demand—the laches and negligence of the prosecutor. Equity will shorten or enlarge the time for relief, according to the peculiar circumstances of each case.

It is the well settled doctrine of equity that in cases of fraud, if prescription runs at all it only runs from the time of the discovery of the fraud.

Brookshark vs. Smith, 2 Younge and Coll., 58, (exch.)
Blair vs. Bromley, 5 Hare, 542.
Lawrence vs. Trustees of Orphan Home, 2 Denio, 581.
Story Eq., Sec. 1521, (9th Ed.)
Hill on Trustees, p. 168.

The doctrine of Lord Redesdale, in Bond vs. Hopkins, 1 Schoules and Lefroys, 413, is that as against "the wrongful possessor and claimant by false title, no length of possession shall bar the real title." The doctrine of this court, in Michoud et als. vs. Girod, 4 How. 561, is, that:

"In case of actual fraud, no case can be found on the books, in which a court of equity has refused to give relief within the life time of either of the parties, or within 30 years after it has become known to the party whose rights are affected by it."

And when, therefore, it appears, as in this case, that complainant was left in early childhood to the hands of strangers, reared in ignorance of all her rights as heir to these estates, and even of her own real name until 1833—that from the day her rights as heir of Daniel Clark's estate were first made known to her, she has pursued those rights with sleepless vigilance and untiring energy; that for more than one third of a century she has devoted the best energies of her life to expose the frauds of her father's false friends, and to thwart the machinations of her open enemies, struggling against a combination of power and wealth so formidable that one less energetic and persistent would long since have abandoned the contest, we have a right to say that to one thus deprived of her rights by fraud, and thus vigilantly seeking them in a court of equity, the bar of time should never be interposed. She has a right to invoke the sentiment of Lord Erskine, "no length of time can prevent the unkennelling of fraud."

She has a right to the application of the words of

Lord Chancellor Northington, in Alden vs. Gregory, 2 Eden, 285: "Will delay purge a fraud? Never while I sit here. Every delay adds to its injustice and multiplies its oppression."

She has a right to ask this court to adopt the doctrine of Lord Brougham, in Irvine et al. vs. Kirkpatrick, 3 Eng. Law and Eq., 24, in which prescription had run for forty years: "I, too, say that no time will run to protect and screen fraud. I, too, say that a court of equity will overleap the barrier of time, to get at the fraudulent parties and their deeds, and to prevent any one, *whether accomplice or innocent, from profiting by the* fruits of fraud."

We now submit to this court the cause of this complainant against Slidell, Creppel, Seneschal, Diamond, Lameyer, and the City of New Orleans. We invoke the authority of the case of Gaines vs. Hennen, 24 Howard, 555, as decisive of this controversy.

The issues of law and fact, and the evidence in support thereof, are identically the same in both cases. Upon the faith of that decision innocent parties have made large advances to complainant.

This court will not reverse the Hennen decision, when no new issues of law are raised, and no new facts presented.

But whatever may be the adjudication of this court, we trust it will be in such terms as shall settle this controversy forever.

C. Cushing

United States Supreme Court.

81. Myra Clark Gaines, Appellant, vs. F. D. De La Croix, Appellee.

82. Myra Clark Gaines, Appellant, vs. City of New Orleans, et al., Appellees.

83. Myra Clark Gaines, Appellant, vs. M. I. Lizardi, et al., Appellees.

Supplemental Brief in Behalf of the Defendants.

MILES TAYLOR,
J. M'CONNELL,
Solicitors for Defendants.

McGill & Witherow, Printers, Washington, D. C.

Supreme Court of the United States.

No. 81. MYRA CLARK GAINES, appellant, *vs.* F. D. DE LA CROIX, appellee.

82. MYRA CLARK GAINES, appellant, *vs.* CITY OF NEW ORLEANS, *et al.*, appellees.

83. MYRA CLARK GAINES, appellant, *vs.* M. I. LIZARDI, *et al*, appellees.

SUPPLEMENTAL BRIEF IN BEHALF OF THE DEFENDANTS.

I. Points in relation to the facts involved in the cause, &c., with references to various parts of the record which sustain these points.

1. Daniel Clark was engaged in business, in New Orleans and elsewhere, with D. W. Coxe and Chew & Relf, or some of them, from about 1792 to the time of his death, and the real relations existing between them in their business concerns was concealed from the public.

Test. of D. W. Coxe, 2 vol., p. 414, ans. to 3d int.
Letter of Daniel Clark, 18th Feb., 1802, 2 vol, pp. 852–3.
Letter of Daniel Clark, 20th July, 1802.
Letter of Daniel Clark, 17th April, 1806, 2 vol., pp. 444–5–6.
Letter of Daniel Clark, 7th Aug., 1806, 2 vol., p. 453.
Letter of Daniel Clark, 4th Sept., 1806, 2 vol., 454.
Letter of Daniel Clark, 12th Sept., 1806, 2 vol., 455.
Letter of Daniel Clark, 15th March, 1811, 2 vol. 490–1.
Letter of Daniel Clark, 22d March, 1811, 2 vol., 491.
Letter of Daniel Clark, 29th June, 1812, 2 vol., 594.

2. The various business operations in which Daniel Clark was interested were disastrous; and he was involved in great

pecuniary embarrassments from as early a period as 1802. And these embarrassments continued to increase steadily up to the time of his death, when he was hopelessly insolvent.

Letter of Daniel Clark, 18th Feb., 1802, 2 vol., pp. 852–3.
Letter of Daniel Clark, 20th July, 1802.
Letter of Daniel Clark, 7th Oct., 1802.
Letter of Daniel Clark, 15th May, 1806, 2 vol., 447.
Letter of Daniel Clark, 7th Aug., 1806, 2 vol., 453.
Letter of Daniel Clark, 4th Sept., 1806, 2 vol., 454.
Letter of Daniel Clark, 12th Sept., 1806, 2 vol., 455.
Letter of Daniel Clark, 2d March, 1811, 2 vol., 490.
Letter of Daniel Clark, 15th March, 1811, 2d vol., 490–1.
Letter of Daniel Clark, 22d March, 1811, 2 vol., 491–2.
Letter of Daniel Clark, 18th Oct., 1811, 2 vol., 494.
Letter of Daniel Clark, 15th June, 1812, 2 vol., 575.
Letter of Daniel Clark, 29th June, 1812, 2 vol., 594–5–6–7.

3. Arrangements made, by written instruments, between Daniel Clark, Chew & Relf, and D. W. Coxe.

Agreement between Daniel Clark and D. W. Coxe, 18th April, 1807, 2 vol., 435–6.
Agreement between Daniel Clark, as attorney in fact of Chew & Relf, with D. W. Coxe, 11th July, 1811, 2 vol., 620.
Agreement between Daniel Clark and D. W. Coxe, 12th July, 1811, 2 vol., 426–7–8.
Private explanatory agreement between Daniel Clark and D. W. Coxe, 12th July, 1811, 2 vol., 610.
Agreement between Daniel Clark and Beverly Chew and Richard Relf, 19th June, 1813, 2 vol., 700–1–2.

4. Daniel Clark held himself out to society as an unmarried man, and at the time of his death was universally believed to have been unmarried, and to have left no legitimate descendants. And his conduct justified this belief.

Test. of D. W. Coxe, 2 vol., 417, answer to 15th int.
Letter of Daniel Clark to his sister, 14th October, 1805, 2 vol., 526–7.
Letter of Robt. Goodloe Harper, 27th Sep., 1808, 2 vol., 836.
Letter of R. G. Harper, Sept. 12, 1808, 2 vol., 838–9.
Letter of Mrs. Caton, 16th of April, 1807, 2 vol., 841.

Test. of Mrs. Julia A. Wood, 2 vol., 521–2, ans. to 4th int.

Test. of Mrs. Caroline M. Slanard, 2 vol., 524, ans. to 4th int.

5. The connection between Daniel Clark and Zulieme Carriere, the mother of Caroline Barnes, and of the complainant in this case, was believed, during the entire life of Daniel Clark, and for upwards of twenty years after his death, in 1813, to have been altogether illicit. And this belief was justified by the conduct of both Daniel Clark and Zulieme Carriere, and by the conduct of the friends of the complainant.

(*a*) Conduct of Daniel Clark.

Test. of D. W. Coxe, 2 vol., 417 to 420, answer to 14th, 17th, and 18th ints., and, at pp. 924–5, answer to 4th and 5th ints.

Test. of S. B. Davis, 2 vol., 280, and following answer to 5th and 6th int. in chief, and to 6th cross int., taken in 1849, and at p. 987, and following answer to 3d, 4th, 5th, and 6th ints. in chief, and to 79th and 80th cross ints.

(*b*) Conduct of Zulieme Carriere.

Institution of suit, in 1805, for alimony, 2 vol., 554.

Institution of suit for a divorce, in 1806, 2 vol., 557–8.

Marriage to James Gardette, on 2d Aug., 1808, 2 vol., 419, and p. 432.

(*c*) Conduct of the friends of complainant.

Application in 1817, by S. B. Davis, for alimony for complainant as the natural child of Daniel Clark, 2 vol., 552–3.

Test. of Peter A. Browne, 1 vol., 895–6–7.

(*d*) Conduct of the mother of Daniel Clark.

Will of Mary Clark, made on the 22d of Nov. 1817, 2 vol., 535, 6.

6. Daniel Clark made provision, by secret trusts, for complainant in the years 1811, 1812, and 1813.

Sales from Clark to Bellechasse, and from Bellechasse to complainant, 2 vol., 541–4–5.

Letter of Bellechasse, 2 vol., 707–8.

Sale of Delacroix to complainant, 2 vol., 542–3.

Test. of S. B. Davis, 2 vol., 988, 995.

Test. of D. W. Coxe, and letter of Mazereau, 2 vol., 421, 432.

7. Mary Clark, the surviving mother of Daniel Clark, was, at the death of Daniel Clark, in 1813, universally believed to be his forced and only legal heir; because all knowing him believed he had died unmarried, and without legitimate issue; and the public and all persons entering into contracts with a view to acquiring rights to property in which Daniel Clark had had an interest during his life, were justified in regarding her as the heir of Daniel Clark, and fully authorized in law to dispose of any property or right of which he, Daniel Clark, died seized.

8. By the agreement entered into on the 19th day of July, 1813, between Daniel Clark and Beverly Chew and Richard Relf, all the property then standing in the name of Daniel Clark was vested "jointly and coequally" in Beverly Chew, Richard Relf, and Daniel Clark, (with only certain specified exceptions,) in such a manner that such property, whether consisting in "lands, debts, or other effects," and the property of Chew and Relf, was affected and charged with the payment of the debts of the parties to the agreement referred to in it; and Daniel Clark, Beverly Chew, and Richard Relf, respectively, were only entitled each to one-third of the residuum or property remaining after the payment of the debts in question.

Articles of Agreement, 19th June, 1813, 2 vol., 700.

9. After the death of Daniel Clark, a will, made by him, and dated on the 20th May, 1811, was duly admitted to probate, and ordered to be executed; and all the property belonging to Daniel Clark in his individual capacity was inventoried and disposed of under the authority of the court of probate, and in due course of law, in the months of October and November, 1813, and January, 1814.

Probate Record, pages 12 to 62, and 83.

10. Beverly Chew and Richard Relf, the surviving partners of Daniel Clark, in their individual capacities as surviving partners and joint owners of the property affected and charged with the payment of the debts of the partnership formerly existing between them, retained the administration of the property embraced in the agreement of the 19th of June, 1813, and continued to administer it within the approbation and concurrence of Mary Clark, the apparent heir of Daniel Clark, during her lifetime, and of her heirs and legal representatives after her death; and this partnership property, belonging "jointly and coequally" to Beverly Chew, Richard Relf, and

Daniel Clark, constituted the only property in which Daniel Clark had an interest at the time of his death which had not been disposed of and sold under the authority of law immediately after his death.

Application of Beverly Chew and Richard Relf to the District Court of New Orleans for a Respite, on the 3d of March, 1814, 2 vol., 621–2, &c.

Power of Attorney from Mary Clark to Chew and Relf, 1st Oct., 1813, 2 vol., 665–6; 1 vol., 580.

Will of Mary Clark, 2 vol., 535 to 537; 1 vol., 580.

Power of Attorney from Joseph Reed, Test. Ex. of the Will of Mary Clark, 13th Dec., 1824, 2 vol., 538.

Letter of Joseph Reed, Test. Ex., 23d May, 1828, and Letter from George Green, Jr., April and May, 1828; Probate Record, 108, 109, 110.

11. In the schedule accompanying the petition for a respite, filed in March, 1814, by Chew and Relf, acting for themselves and as executors of the last will of Daniel Clark, they enumerate all the property claimed in this suit, and in the other suits brought by complainant, and in their petition they speak of this property as "their estate," and say that they "believe the assets to be very abundant to discharge every debt due and owing by them, and to leave a large surplus to themselves and to the heirs of the late Daniel Clark," &c. The debts which were due by them, and with reference to which the application for a respite was made, are spoken of as "debts due by Chew and Relf and the deceased Daniel Clark."

The debts mentioned in the schedule amounted to $205,722 78. At the meeting of the creditors, debts to the amount of above $193,361 14 were proved by the oaths of the creditors, or their agents, who were in attendance. Of the creditors who presented themselves, a portion styled themselves creditors of Daniel Clark individually; a portion styled themselves creditors of Daniel Clark and Chew and Relf; and a portion styled themselves creditors of Chew and Relf alone, as follows:

Creditors of	Daniel Clark, ...	$90,880 94
"	Heirs of D. Clark and Chew and Relf, ...	98,531 00
"	Chew and Relf, ...	3,950 00
		$193,361 94

In the enumeration of debts, no mention was made of the amounts due by Daniel Clark to Stephen Henderson and

others, and which affected his individual property, which had been before sold under the authority of the court of probate, to effect their payment. Nor was there any mention made of the debt due by Daniel Clark to D. W. Coxe, for $150,000 and upwards, and for the payment of which the property described in the schedule was affected, under the agreement of the 19th of June, 1813. Thus, the debts which were due in 1813, and for the payment of which the property spoken of in the schedule was specially affected, under the agreement of the 19th of June, 1813, exceeded the sum of $375,722 94.

Petition for Respite filed in March, 1814, 2 vol., 621–2.

Schedule annexed to the petition, of "the debts due by Chew and Relf and the deceased Daniel Clark," and of "debts due them and property belonging to them, 2 vol., 623, 4, 5, 6.

Meeting of creditors, 6th April, 1314, 2 vol., 628 to 634.

Agreement between Daniel Clark and D. W. Coxe, of 12th July, 1811, 2 vol., 426.

12. A respite of one, two, and three years was granted by the creditors of Daniel Clark and Chew and Relf in April, 1814, but the condition of the country continued to be such, that debts could not be collected, and it was many years before real property could be disposed of, so as to be made available for the payments of the debts due by the concern of Daniel Clark and Chew and Relf.

Sale to E. Debon, 19th December, 1820, 1 vol., 794 and *seq.*

Sale to E. Blanc, 21st December, 1820, 2 vol., 207, 8.

13. Mary Clark, the mother, and forced and only legal heir of Daniel Clark, departed this life in 1823.

Test. of D. W. Coxe, 2 vol., 413; 1 vol., 580.

14. The complainant was born in or about the year 1804.

Test. of S. B. Davis, 2 vol., 281.

Test. of Horatio Davis, 2 vol., 381.

Test. of Madam Boisfontaine, 2 vol., 948.

Test. of Bishop Chase, 2 vol., 295.

15. No claim to the succession of Daniel Cark, whether as instituted heir, or as heir-at-law, was ever made by the complainant, until sometime in or about June, 1834, when she presented herself in the probate court of New Orleans, and

alleged, in a petition signed by her counsel, that she was the daughter of Daniel Clark, and that he, Daniel Clark, had executed a will subsequently to that dated on the 20th of May, 1811, which had been admitted to probate, "by which he revoked the will aforesaid, and in which he instituted his aforesaid daughter Mary Clark Whitney his sole heir.

Copy of petition, 2 vol., 708, 9.

16. In August, 1836, complainant exhibited her bill of complaint, in which she claimed the property described in her bill, filed in the present cause, as the instituted heir of Daniel Clark, under a will executed by him "in or about the month of July, 1813," and in which he declared her "to be his legitimate child."

2 vol., 1, 8, 23.

17. On the 28th of November, 1848, the complainant renounced, for all the purposes of that suit against the defendants named in it, "all claims," which she had before "made to the estate of the said Daniel Clark, as his universal heir and devisee by the said will of 1813," and declared that she would "assert and maintain her right, title, and equity to the four-fifth parts of the property, &c., as the forced heir of Daniel Clark," &c., &c.

2 vol., 78, 74.

18. In the cause begun by complainant in 1836, and in which the renunciation just mentioned was made in 1848, answers were filed by the defendants, in which the heirship of the complainant, as the legitimate child of Daniel Clark, was put at issue, and, after due proceedings had, a final judgment was rendered therein by this court, in which it was decreed that the defendant "is not the heir of Daniel Clark, and can inherit nothing from him."

II. Some of the questions presented in the cases now before the court:

1. The complainant now claims the property described in her bill of complaint as the instituted heir of Daniel Clark, under and in virtue of a last will and testament alleged to have been made by him on or about the 13th day of July, 1813, and to have been duly admitted to probate, according to law, in the State of Louisiana, in a legal proceeding begun on the 18th day of January, 1855, and terminated on the 23d day of February, 1856.

Bill of Complaint, filed 23d of Dec., 1856, 1 vol., 1 to 6.

2. The right of complainant to recover any portion of the property in the possession of the defendants is resisted by the defendants, on the following, among other, grounds:

First. That Daniel Clark never made any will by which the complainant was made his instituted heir. (1 vol., 33, 52.)

Second. That Daniel Clark, at his death, was not seized in fee simple and lawfully possessed of the property claimed in the bill of complaint; that two-thirds of the same belonged, "jointly and co-equally," to Beverly Chew and Richard Relf; that this property was specially affected, and subject to the payment of certain debts of the partnership of Daniel Clark and Chew and Relf; and that Daniel Clark had only an equitable interest in the one undivided third part of any of the property which might remain after the payment of these debts. (1 vol., 60, 61, 62.)

Third. That the titles of the defendants were derived from Mary Clark, the mother of Daniel Clark, and his forced, legal, and only heir, who in law stood in the place and stead of Daniel Clark, as the owner of one undivided third part of the property, and from Chew and Relf, the owners of the other undivided third parts of the property in question, and are good, and vest the full ownership of the property in them.

Fourth. That if the complainant were, in truth, the instituted heir of Daniel Clark, and were capable of taking from him by will, she could, under the laws of Louisiana and the principles of the civil law, which are recognized in the said State of Louisiana, have no right to recover any property disposed of by Mary Clark, the apparent heir of Daniel Clark, in her capacity of heir, or by any one acting under her authority. (1 vol., 54.)

Fifth. That the complainant, in 1848, renounced her claim to the property sued for as the instituted heir of Daniel Clark, under the will of 1813, and that the renunciation so made is a bar to any recovery in this cause. (1 vol. 63.)

Sixth. That all claim to the property described in complainant's bill is now barred by proscription and the statutes of limitations of the State of Louisiana. (1 vol. 15.)

III. Points and authorities as to some of the questions presented in the cause.

First. Daniel Clark never made any will by which complainant was made his instituted heir.

1. Persons cannot claim title under a will until the will has

been admitted to probate by the proper tribunal, and been recognized as such, and ordered to be executed. The "probate" of a will is a condition precedent to its being set up as a basis of title.

Vidal *vs.* Duplantier, 7 L. R., 45.
Stewart *vs.* Row, 10 L. R., 533.
Marcos *vs.* Barcas, 5 A., 265.
Landry *vs.* Duncan, 5 A., 612.

2. The admission of a will to probate, and the order for its execution, are but preliminary proceedings, necessary to the administration of the statutes, and do not amount to judgments, binding on persons not parties to them.

Bauthemy *vs.* Dreux, 10 M. R., 1.
O'Donagan *vs.* Knox, 11 L. R., 389.
Trahan *vs.* Ardouin, 11 L. R., 390.
Robert *vs.* Allier, 17 L. R., 4.
Rachal *vs.* Rachal, 1 L. R., 115.
Succession of Duplessis, 10 R., 193.
Sophie *vs.* Duplessis, 2 A., 724.
Succession of Duplessis, 4 A., 570.
Succession of Clark, 11 A., 124, 131, 135.
Abston *vs.* Abston, 15 A. 137.

3. The judgment in 1856, admitting a will of Daniel Clark, made in 1813, to probate, not being binding on persons not parties to the proceedings in which it was rendered, makes no proof in this case. The evidence in the record does not establish the execution of any such will. Only two witnesses testify to the execution of the will, and their testimony is entitled to no credit. The other witnesses only testify to declarations of Clark, and their testimony is entitled to no weight.

Testimony of Harriet Harper, Probate Record 139 to 144.
Testimony of Peter A. Brown, 1 vol., 895, 6, 7.
Testimony of D. W. Coxe, 2 vol., 421, 432.
Sales, 2 vol., 542–3, 541, 544, 545.

4. The question as to the existence and contents of a will in a case like this should be submitted to a jury.

Second. Daniel Clark, at his death, was not seized in fee simple and lawfully possessed of the property claimed in the bill of complaint.

Agreement between Daniel Clark and Beverly Chew, and Richard Relf, of 19th June, 1813, 2 vol., 700.

Code of 1808, p. 306, art. 222, 229.
Doubrere *vs.* Grillier's Syndic, 2 N. S.
Martines *vs.* Layton & Co., 4 N. S., 370, 1, 4.
Roulier *vs.* Syndic, of Sabatier, 6 N. S., 429, 430, 1.
Wells *vs.* Walker, 8 L. R., 21.

Third. The titles of the defendants were and are good in law, and vest in them the full ownership of the property which they purported to transfer.

1. Immediately after the death of Daniel Clark, his olographic will, of the 20th of May, 1811, written, dated, and signed in his own handwriting, was admitted to probate; one of the executors named in it was qualified to act. An inventory of all his individual property was made, and it was sold, to effect the payment of his debts, in the months of October and November, 1813, and of January, 1814.

Code of 1808, p. 242, art. 153, and *seq.;* p. 244, art. 166, 167, 168; p. 246, art. 169.

2. But no inventory was made of the property which was embraced in the agreement between Daniel Clark and Chew and Relf, on the 19th day of June, 1813, and which belonged to Beverly Chew and Richard Relf jointly and co-equally with Daniel Clark, and was, by the terms of that agreement, vested in these three persons, associated together as partners in a great variety of business transactions, and was affected and specially dedicated by the parties to it to the payment of the debts of the concern of Daniel Clark and Chew and Relf, and of certain debts of Daniel Clark, and of that specially due by him to D. W. Coxe, in such a manner that neither of the parties, individually, were entitled to withdraw anything from the common property, except for the payment of their personal expenses, until the payment of the debts in question had been effected out of it.

Agreement, 2 vols., 700, 701, 702.

A partnership in fact had existed from 1801 between Daniel Clark and Chew and Relf and D. W. Coxe, though the connection between them was purposely concealed from the public. In 1811 a settlement was made between D. W. Coxe and the other partners, and he then withdrew. The partnership, however, continued to exist between Daniel Clark and Chew and Relf; and the agreement of the 19th of June, 1813, was a mere recognition of the fact of the existence of such a part-

nership, and that "all the property, debts," &c., held in the name of Beverly Chew and Richard Relf, "or in that of Daniel Clark's or D. W. Coxe's," belonged to that partnership, and furnished legal evidence that Beverly Chew and Richard Relf, two of the partners, had a "joint and co-equal" interest as owners in the immovable or real property standing in the name of Daniel Clark.

Code 7, 1808, p. 310, art. 241; p. 344, art. 2.

The partnership which had existed for so many years between these parties, and which had in fact extended to nearly all of the transactions in which they had been respectively engaged, was, by the execution of this agreement, made in law to embrace all the immovable property in Louisiana standing in the name of Daniel Clark, with the exception only of certain property specified in the agreement, and therein acknowledged to be "Daniel Clark's private property," and was also made to continue until all the debts with the payment of which it was affected and charged had been paid.

Code of 1808, p. 388, art. 4, 5, 8; p. 398, art. 46, 1; art. 50, 51.

By the terms of the agreement of the 19th of June, 1813, a partnership between Daniel Clark and Chew and Relf was necessarily to continue after the death of either of the partners, if the death of one of them took place before the payment of the debts, for which provision was made in it. When Daniel Clark died, in August, 1813, none of these debts had been paid, and Chew and Relf, the surviving partners, were entitled to have the joint property remain in their possession, to be administered by them until the expiration of the partnership, and were not required to give security for their administration of the joint stock.

Code of 1808, p. 176, art. 133.

Chew and Relf, therefore, as the surviving partners of Daniel Clark, and as joint owners of the property in question, retained it in their own possession, to be administered under the agreement of the 19th of June, 1813, and disposed of to carry out its provisions. And this administration of the partnership property was carried on by them, rightfully, in their own behalf, as joint owners of the property to the extent of two undivided thirds of it, and, as intended, in the payment of the debts of the partnership, and under the supervision and with the concurrence and express authority of Mary Clark,

the mother of Daniel Clark, and the forced heir of two-thirds of all his estate, and his only legal and apparent instituted heir.

4. The provisions of law in Louisiana for the administration of the estates of deceased persons through curators of absent heirs, beneficiary heirs, or administrators, or testamentary executors, are merely directory, and are intended to apply, and do apply, alone to cases in which the heirs of deceased persons fail to present themselves, and accept unconditionally and purely and simply the successions falling to them.

Code of 1808, p. 166, arts. 96, 7, 8; p. 168, arts. 104, 105; p. 172, art. 118; p. 246, art. 168.

When the heir presents himself, or sends his power of attorney, and accepts the succession falling to him, unconditionally and purely and simply, those provisions have no longer any force or effect. The heir so accepting "becomes of right, and without authorization of justice, seized of all the goods, rights, and actions of the deceased, under the obligation of satisfying all the charges of the succession," and thus stands in the place and stead of the deceased person to whom he has succeeded.

Code of 1808, p. 160, arts. 71, 72; p, 162, art. 73; p. 165, art. 86.

This acceptance can be either express or tacit. (Code of 1808, p. 162, art. 77.) Mary Clark, the forced and only legal heir of Daniel Clark, on being informed of the opening of the succession of Daniel Clark in Louisiana, on the 1st of October, 1813, executed a written instrument, (a power of attorney to Chew and Relf,) in which she assumed the quality of heir. From that time Mary Clark was seized of all the property, rights, and actions of Daniel Clark as his unconditional heir, and was authorized in law to alienate any property belonging to the estate of Daniel Clark, in the same manner that he could have done had he been alive; and any alienations of the property which had belonged to Daniel Clark, made by her in her individual capacity, or by her attorneys in fact for her, and without judicial authority, vested good titles in the purchasers. In France, as in Louisiana, the heir accepting with benefit of inventory is bound to administer the property of the succession as an administrator, and to render an account of his administration to creditors and legatees. He is required to sell the immovables in the manner and according to the forms

prescribed by the laws. (C. C., 803, 806; C. of Procedure, 953, 987, and *seq.*) But if he make a sale of any immovable property of the succession without complying with the formalities required by law, the sale is not null. The sale itself is valid, and transfers the property; and the only effect of a disregard of the formalities prescribed by law is, that it operates as a renunciation of the quality of him with benefit of inventory, and makes him the heir, pure and simple.

Gilbert Codes Annotes C. C., 806.

5. In March, 1814, and within seven months after the death of Daniel Clark, Beverly Chew and Richard Relf, finding the partnership without the means of paying its debts, for themselves and in behalf of the succession of Daniel Clark, applied for and obtained a respite of one, two, and three years from their creditors, through proceedings carried on in the first district court of Louisiana, sitting in New Orleans.

In the schedule annexed to their petition, they mention many of the debts due by themselves and Daniel Clark, and they enumerate all the property claimed by complainant in her various suits as property belonging to themselves and Daniel Clark, and as constituting the assets out of which these debts were to be paid.

6. The property in question was afterwards, and at various times during the life of Mary Clark, sold by Chew and Relf to effect the payment of the debts of the partnership. These sales were really made by them as the surviving partners in the partnership of Daniel Clark and Chew and Relf, and with the concurrence of Mary Clark, the legal heir of Daniel Clark. If the rights of the creditors of Daniel Clark had been enforced at any time within ten years after his death, all his property would have been sold at forced sales, and a large part of his debts would have been left unpaid; and it is now clear that Chew and Relf, for themselves and for Mary Clark, the legal heir of Daniel Clark, administered the partnership property in the most judicious manner to carry out the intent and design of the parties to the agreement of the 19th of June, 1813. They were acting under the powers vested in them by that instrument, and if there was anything in the execution of those powers, this court, as a court of equity, ought to interpose its powers for the protection of the defendants, who are purchasers in good faith and for a valuable consideration, and without any notice of the claim of complainant.

1 Story's Equity Jurisprudence, No. 95, No. 64, *y*.

Fourth. If the complainant is the instituted heir of Daniel Clark, she has no right, under the laws of Louisiana, to recover any property disposed of by Mary Clark, the apparent heir of Daniel Clark, in her capacity of heir of Daniel Clark, before complainants' rights were made known.

In case a right to an inheritance devolves on a person whose existence is not known, such inheritance shall devolve exclusively on those with whom such person would have had a right to divide, or on those on whom the inheritance would have devolved, if such person had not existed. If the person on whom an inheritance is devolved, and whose existence is not known, should appear and make his quality of heir known, "he or she shall recover his or her estate, such as it may happen to be, the price of such as may have been sold, or such estate as may have been bought with the proceeds" of the estate "which may have been sold."

Code of 1808, p. 20, art. 26, 27; p. 18, art. 22; French Civil Code, arts. 136, 13.

The heir who is present, and is called to receive a succession to the exclusion of those entitled to succeed, but whose existence is unknown, is reputed to be the proprietor, and in consequence the alienations made by him are valid, and cannot be attacked by another heir who presents himself afterwards. The real heir only has his recourse against the apparent heir, who alienated it. (Gilbert Codes Annotes, C. C., art. 136, notes 12; C. C., 1599; note 22.) And the decisions of the court of cassation, in France, founded on the articles of the French Code, which are the same with those of the Louisiana Code of 1808, have uniformly recognized the same principle from the year 1813 to the present time. We have references to fifteen cases, adjudicated by that court on this point, but will content ourselves with giving a statement of a single one in this brief. That case is reported in the *Journal du Palais* of 1843, and is entitled De Saisseval C. Opterre and Poulard Dupatin.

In that case M. and Madam Poulard Dupatin took possession of a succession, and made various alienations of the property embraced in it. One of these alienations was made to the Marquis de Lousse, who sold the same property to Mad. de Saisseval. After this, upon civil and criminal proceedings had at the instance of Mad. Opterre, M. Poulard Dupatin was declared guilty of having subtracted or suppressed an olographic testament of the deceased, De Lormey, and then Mad. Opterre, in her quality of legatee under the suppressed tes-

tament, claimed the property alienated by the one guilty of suppressing the testament. The royal court of Poitiers declared the sale to be null. Mad. Saisseval appealed, and upon the appeal the judgment of the court of the first instance annulling the sale was reversed.

The other cases spoken of will be found as follows: 13. Journal du Palais, 3 Avril, 1813; 17 Journal du Palais, 12 Avril, 1823; Journal du Palais, 1830–1831, p. 32, 11 Janvier, 1830; Journal du Palais, 1833, 5 Mars, 1833, p. 237; 26 Avril, 1833, p. 845; 27 Dec., 1833; Journal du Palais, 1843; 16 Janvier, 1843; De Raslainquac *et* Antus c. Rolland, D'hendicourt du Loucourt c. Foubert, 16 Janvier, 1843; Journal du Palais, 1844, 30 Janvier, 1844, Veuve Hoche, c. Heritiers Ossard, Journal du Palais, 1848, p. 585; Journal du Palais, 1849, p. 135; Journal du Palais, 1851, p. 132.

Fifth. The complainant is barred from any recovery in this case by the renunciation of the claim to the property sued for as the instituted heir of Daniel Clark under the will of 1813.

One may renounce, as well as acquire rights.

Sixth. All claim on the part of complainant to the property sued for is now barred by prescription and the statutes of limitations.

By the Louisiana Codes of 1808 and 1825 it was declared that prescription is a manner of acquiring property by the effect of time, and under the conditions regulated by law. And that immovables are prescribed for by ten years between persons present, and twenty years between absentees, when the possession has been in good faith, and held by a just title during that time; that the same species of property is prescribed for by thirty years without any title on the part of the possessor, or whether he be in good faith or not. (Code of 1808, p. 482; art. 32, p. 486; art. 67, 66, C. C. 3420, 3457, 3438, 3442.) The distinction between absentees and persons residing in the State, as to the length of time required to prescribe, was abolished by the act of 1848, (Acts of 1848, p. 60,) and from the date of that act ten years' possession only is required under a just title. The Codes also declare that "good faith is always presumed in matters of prescription, and" that "he who alleges bad faith must prove it."

"There are only two modes of interrupting prescription, that is, by a natural interruption or by a legal interruption," (C. C., 3482,) where there has been no natural interruption. "A

legal interruption takes place when the possessor has been cited to appear before a court of justice, either on account of the property or of the possession, &c. (See C. C., 3484.) But the Code further provides, that "if the plaintiff in this case, after having made his demand, abandons or discontinues it, the interruption shall be considered as having never happened.' (C. C., 3485.)

The prescription of ten and twenty years can only be based on a just title. (C. C., 3450, 3451, 3452, 3453, Code of 1808, p. 488, art. 68.) "Good faith is always presumed in matters of prescription, and he who alleges bad faith in the possessor, must prove it." (C. C., 3445, 3446, 3414; Code of 1808, p. 488, art. 71; p. 478, art. 21.) "It is sufficient if the possession has commenced in good faith, and if the possession should afterwards be held in bad faith, that shall not prevent the prescription. The presumption of good faith is not destroyed by proving that the purchaser had the means of obtaining knowledge of the defect in his title. The means afforded by a reference, &c., is not equivalent to actual knowledge, which will alone destroy good faith. (Fletcher's Heirs *vs.* Cavillier *et al.*, 4 L. R., 277, 278, 279; Morand's Heirs *vs.* Mayor, &c., of New Orleans, 5 L. R., 241, 242; Rivarde *vs.* Rousseau.)

The title under which the defendants hold are just titles. (Duplessis *vs.* White, 6 A., 614.) Utile par inutile non vitiatur. (Walsh *vs.* Usher *et al.*, 2 Hill, N. Y., R. 168; Rousseau *vs.* Tête 6, R. 471.)

There could not have been, by any possibility, anterior to 1834, any knowledge, on the part of any persons acquiring the property in question by purchase, of the existence of any right to it on the part of complainant, and prescription ran in their favor from the time complainant came of age, in 1825, if not before.

There has been no interruption of prescription in favor of the complainant in this suit, because the demand made by her in 1836, founded on the present cause of action, was voluntarily abandoned by her in 1848, and the interruption which would have resulted from it is in law considered as never having happened. The true principle is that the institution of a suit interrupts the prescription running in favor of the possessor of property, as to the party instituting the suit, only as to the demand or cause of action set forth in the proceeding. The interruption growing out of a suit for a particular piece of property, founded on one cause of action, if that suit is abandoned or is decided against the plaintiff, can no more be invóked by him in another suit, brought on another separate

and distinct cause of action, than if the new suit was brought by another individual having no interest in common with him.

Statutes of limitation are statutes of repose, and this is one of the cases calling imperatively for their application. (Bank of Louisiana *vs.* Daniel & *al.*, 12 Peters, 32; Bell *vs.* Morrison, 1 Peters, 360.

If, contrary to our expectations, there should be a reversal of the decrees in favor of the defendants, we respectfully call the attention of the court to the following points:

1. That if the complainant is held to be entitled to recover as the instituted heir of Daniel Clark, in that case her right must be restricted to the disposable portion of the one-third interest which Daniel Clark, the testator, had in and to the property now sued for; and that the value of that portion is to be fixed by ascertaining the value of the property in which he had an interest at the time of his death, and the amount of his debts. (Code of 1808, p. 212; art. 20, 22, p. 214; art. 29, C. C., 1492; Hodder & al. *vs.* Nelder, 2 L. R., 526.)

2. That if it is held that the complainant is entitled to recover any distinct portion of the property claimed, in such an event all the questions relating to fruits and revenues, and to the value of the useful improvements put on the property by the defendants, should be reserved; and that no writ of possession should be permitted to issue until these various matters have been definitely settled, because by the laws of Louisiana the possessor of real estate who has made works, constructions, or improvements on it, has certain rights therein which must be settled before he can be required to yield up the property. (Code of 1808, p. 104, art. 12; C. C. 500, 3416; Gracie *vs.* Gayoso, 7 N. Y., 651; 4 L. R., 273; 10 L. R., 117.)

All of which is respectfully submitted,

MILES TAYLOR,
J. McCONNELL.
Solicitors for Defendants.

Feb. 3 Mr. Mc[illegible] – Jan 1.5 – Comm[s] 11.30

Supreme Court of the United States.

Appeals from the Circuit Court, District of Louisiana.

MYRA CLARK GAINES, *Appellant*,
vs.
F. D. DE LA CROIX, *Appellee.*
} No. 81.

MYRA CLARK GAINES, *Appellant*,
vs.
CITY OF NEW ORLEANS ET AL. *Appellees.*
} No. 82.

MYRA CLARK GAINES, *Appellant*,
vs.
M. J. LIZARDI ET AL. *Appellees.*
} No. 83.

Mandate to 239.

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BRIEF FOR THE DEFENDANTS AND APPELLEES.

The issues presented in these three records, consisting of various pleas, and answers of thirteen defendants, may conveniently be heard and determined together, because, by stipulation, the evidence introduced in any one of them was to be considered as offered in each of the others.

Record No. 81, presents the isolated case of the complainant against F. D. de la Croix, upon his answer;

Record No. 82, the case of complainant against the city of New Orleans and H. E. Lameyer upon their answers;

Record No. 83, the cases of complainant against N. Dabon, J. J. Lamoine, Elizabeth Dauphine and Aloyse Dauphine impleaded as Elizabeth and Aloyse Minturn, Paul Pesquier and Theresa Massana, upon pleas to the jurisdiction of the Court, and against William Crippell, John Diamond and E. P. Senecal, revived against Isabella Jenkins upon their answers.

In referring to testimony, for convenience and greater certainty, we will use printed Record No. 82, that of the city of New Orleans.

I.—*The pleas* present themselves first for consideration.

Elizabeth and Heloise Dauphine, impleaded as Elizabeth and Aloyse Minturn, plead to the jurisdiction of the Circuit Court. They aver that they *are free people of color*, and as such, not citizens of the State of Louisiana, nor of the United States. That their mother, Pelagie Dauphine, was at the time when they were respectively begotten and born, a free woman of color, "regularly descended from the ancient people called Africans." That they do not possess the status of citizens in the sense used by the Constitution in defining and limiting the jurisdiction of the Courts of the United States.

They also aver that the State of Louisiana has regulated by law the status of free people of color within her territorial limits, and adopted and promulgated a special system of jurisprudence for their government and the protection of their rights by which they are positively excluded from all rights of citizenship.

We do not propose to enter upon a discussion of the important question of citizenship here presented, because the legislation of Congress, under which the right has been created, if it exists at all, is familiar, and has been called to the attention of the Court recently, in various forms.

When the Circuit Court maintained these pleas in 1860, certainly no law existed under which they could claim such citizenship. At no time in the history of the Government have free people of color enjoyed the status of citizens.

The right cannot be claimed under the third article of the treaty of cession by which the Territory of Louisiana was acquired, for two reasons. *First.* Because the inhabitants of the ceded territory were to be admitted to the rights of citizens "*according to the principles of the Federal Constitution.*" And this instrument, as construed at that time, certainly conferred no right of citizenship upon free people of color. *Second.* Because it does not appear from the plea that these defendants or their ancestors were inhabitants of the Territory of Louisiana, at the period of the cession. The averment in the plea being that "their mother was at the time they were begotten and born, a free woman of color, regularly descended from the ancient people called Africans," and that therefore they are "free people of color." For aught that appears in the pleas, their ancestors and themselves may have been born in Africa, and not become inhabitants of Louisiana until half a century after the treaty of cession.

We submit this question to this intelligent tribunal, with the remark that it is incumbent on those alleging the fact of citizenship, to show the source whence the right emanates, and that if the right be the creature of legislation, then to show that such legislation is not repugnant to the fundamental law of the land.

Pleas to the jurisdiction of the Court were also filed by Widow Ramon Massana and P. Pesquier, on the ground that they were not citizens of the State of Louisiana, as alleged, but were subjects and residents, the former of Spain and the latter of France.

See R. 83, pp. 943 and 949.

The technical point is made, that the plea is defective, in not denying that they were citizens at the time of the filing of the bill.

We meet this technical objection with a technical answer.

The pleas contain the distinct averment that they are not, *as is alleged in the complainant's bill*, citizens of Louisiana. Here is a denial which refers to the bill itself, and of necessity therefore, refers back to the date of the filing of the bill. And *besides*, they aver that "they now reside in France and Spain respectively, and *never have been* citizens of the United States, and in no manner answerable to the jurisdiction of the Court, &c."

The decree of the Circuit Court maintaining these pleas was rendered Nov. 21, 1857, and signed 4th Dec., 1857. See R. 83, vol. 1, p. 978.

The petition of appeal in these two cases was not filed until April 13, 1865. See R. 83, vol. 1, p. 958.

No ground is mentioned in the petition or cause assigned for the delay of *seven and a half years*, and as it is manifestly too late for a devolutive appeal, we respectfully ask that the appeals as to these defendants, Pesquier & Massana, be dismissed.

The act of Congress passed at the session of 1866-67 (see page 545), cannot be so extended as to embrace these cases by any forced construction.

II.—*The answer of de la Croix* presents a distinctive feature from that of all the other defendants, in this, that the property claimed from him is stated in the bill to be two *gangs of slaves*, and their increase and hire. No real estate is sought to be recovered.

The first question arising in his case will be, whether this Court will now recognize and enforce a claim for slaves or their hire.

We do not perceive the ground for any legal distinction between the claim for a slave and a claim for the hire of a slave. If one cannot now be recovered, it is certain the other cannot, because the source of obligation is identical in each case. In

view of the necessarily extended dimensions of this brief, and in view of the fact that the mind of the Court has been much directed of late to the consideration of this topic, we waive its discussion, with the single remark, that no such recovery could now be had in the State of Louisiana under recent decisions of its supreme tribunal repeatedly made.

But the necessity for considering these questions at all, are obviated by the fact that the claim against de la Croix has long since been barred by *prescription*, as the time for prescribing title to slave property under the laws of Louisiana was only *half* the period required for the prescription of title to real estate.

The complainant avers in the bill that de la Croix *took possession* of one gang of slaves in Oct., 1813, and of the other gang in December of that year, and that he has *ever since had possession*. See R. 81, p. 2.

This possession was under a title translative of property, and his good faith is not only presumed by law, but is sustained by his answer under oath, and by the proof in the record. This would give him a title by prescription in *five* years.

See Code of 1808, p. 486, art. 67 and ib., p. 488, art. 74.

On the supposition that his title was *knavishly* acquired—the mere possession—for *fifteen* years would have perfected his title.

See Code of 1808, p. 486, art. 66.

We do not suppose that this Court will now entertain a suit for the recovery of slave property, but in justice to the reputation of this chivalrous old gentleman, who has long since been called away from these scenes of litigation, we would ask the Court before crediting the complainant's aspersions of his memory, to read his answer solemnly attested, and bear its statements in mind as the proofs in its support hereafter present themselves in this voluminous record. His hands are clean from the fraud so gratuitously imputed. He well knew that the complainant was Clark's illegitimate child, for Clark told him

so, and made clandestine provision with him for her as such, which facts and others of a kindred nature, pertain to the general defense which will be stated in order hereafter.

The case against the city of New Orleans varies from the rest in the following particulars:

1. Although she possesses a large ultimate interest as warrantor, and as such, is deeply interested in the issues now presented for decision, yet, her answer discloses that she is not in possession of any of the property, for the recovery of which this suit is brought, having long since sold the same to various parties, with the exception of five squares of ground, which have been withdrawn from commerce and dedicated to public use.

See the answer of the City, R. No. 82, vol. 1., p. 27, and answers of the Mayor to interrogatories, ib. pp. 69 and 70.

2. A very important feature peculiar to the defence of the case for the city of New Orleans is this: Her title does not come through the *executors* of Clark's estate at all, but from Chew and Relf, *as attorneys in fact of Mary Clark*, and in their own names. Not one word is said in the act of their being or claiming to be *executors* of any estate, and in this respect it differs from the Hennen title, and from all the other acts passed by Chew and Relf, as will appear from its inspection.

See R. No. 82, vol. 2, p. 207, translation at page 1080 of same volume. See also answer of the city, vol. 1, pp. 22 and 23.

We conceive that there is to be found in this fact an important distinction in favor of this title, and especially in this: Their vendor, Evariste Blanc, purchased 30th Oct., 1821, in good faith, a title, which on its face was altogether free from any statement that could be construed as notice to him in any way that Chew and Relf claimed to act as *executors*. They represented themselves, and sold this property under a power

of attorney from the sole heir then in possession of the estate of Clark. The power of attorney had been duly recorded in the office of John Lynd, a Notary Public in New Orleans, on the 2d of April, 1817, as the law required it should be, (R. No. 82, vol. 2, p. 665), and it amply authorized the sale of real estate.

Under these circumstances, what better title could Evariste Blanc have acquired. The city succeeds to his rights, and must be allowed the benefit of his good faith and purchase, without even the constructive notice which it is pretended the other purchasers received, from the circumstance that in the titles under which they claim, Chew and Relf harmlessly assumed the qualities of executors.

The fact was that Chew and Relf inventoried and settled the *private* estate of Clark as his executors. They were the attorneys in fact, of Mary Clark, the heir instituted and in possession, and in that capacity represented the interests of Daniel Clark in the large mass of real estate, most of which was unproductive; but all of which, except Clark's personal estate described in the inventory, belonged to the *partnership* which existed between themselves and Clark. But we are anticipating a matter of general defence, which belongs to another portion of this brief.

3d. It must be borne in mind that the only interest which the city of New Orleans had in making the purchase of the land in question, was for *public purposes*—such as for the opening of streets, etc., and there is a well defined distinction in favor of sustaining titles purchased by corporations for public purposes.

See the decision of the Supreme Court of Louisiana, reported in 12 Rob., p. 553.

4th. Another matter of defence special to the case of the city, is the fact that *no legal citation* was made of the complainant's bill of 1836, until the month of June, 1849; so that

there was a lapse of thirty-five years and ten months from the date of Clark's death to the date of citation, during all which period prescription was not interrupted.

The failure of citation occurred thus: By the act of the Legislature of Louisiana, dated 8th of March, 1836, (page 34. §15) the city of New Orleans was divided into three municipalities, corporations separate and distinct from each other. By the terms of this law, the real estate belonging to the previously undivided corporation, vested in each municipality in which it was situated respectively.

Municipality No. One, thus became the full and absolute owner of the property in question, and as such owner, appeared and defended the suit in June, 1849. See R. 82, v. 2, p. 174.

On the 13th August, 1836, more than six months after the legal title had passed from the city into Municipality No. One, a citation was served upon the city, (See R. 82, v. 1, p. 253,) which had been divested of the title—and there was no citation made upon the municipality, the real owner, consequently there was no interruption of prescription, as above stated.

III.—*The Decision in the Hennen case not authority.*—Before presenting the defences which are common to all the defendants, it is necessary we should invite the special attention of Your Honors to the decision rendered by this Court in the case between the Complainant and D. N. Hennen, who was a co-defendant in the suit No. 83. It will be found reported in 24 Howard, 553.

The Defendants respectfully ask that the decree in that case be restricted in its operation to the defendant Hennen, and they *earnestly protest* that it ought not be considered in any sense decisive of the great questions of fact and of law involved between the complainant and these defendants, for the following reasons:

It can be proved that the defendant Hennen desired and in-

tended to let the complainant obtain a decree against him, and the defendants have had no opportunity of proving the collusive character of said suit, because the records in the cases now before this court for trial, had been closed by definitive judgments against the complainant, before the rendition of the decree in the said Hennen suit, in this Court.

After the imposition practiced upon this Court in the Patterson case had been exposed, and the attempt to obtain from one of the defendants a *consent* judgment—intended to be used against the others—had failed so signally, we find a similar proceeding again resorted to; and, as in the Patterson case, his counsel was above such collusion, and conducted and argued the cause as though it were a real suit, so in the Hennen case, no doubt, did Mr. Janin, who is stated to have appeared for the city of New Orleans, attempt in good faith to make an argument for the defence. But it was a fact well known—the brief of Mr. Janin shows it—that this gentleman met with a serious accident, resulting in such acute suffering that he was physically unable to present the case fully to the court.

Of the original counsel for the city of New Orleans, one (Mr. Duncan) had died, and the other, (Mr. McConnell,) was satisfied of Mr. Hennen's intention and desire to lose the suit, though he did not possess positive proof of the fact, and therefore, especially as there were other defendants whom he did not then represent, he did not feel justified in participating in the trial of a case where there was, in his opinion, no real contest. That opinion has since been confirmed, by the following facts: The certificate of the clerk of the United States Circuit Court of Louisiana, shows that, although the judgment in the Hennen case was rendered in 1860, the complainant was not put in possession until after the lapse of *five years*, and then only of the *real estate* sued for. That the decree of this Court against Mr. Hennen has been *otherwise unexecuted*, although it gave the complainant a judgment against Hennen for *costs* and for the *rents* of the property from the 13th May, 1844; and there is

March 6 1839.

Hennen Curtis Janin

proof before this Court that the property was productive when Hennen bought it, in 1844, yielding then a rent of sixty dollers per month.

See act of sale, Hennen Record, vol. 1, p. 17.

Besides this, the complainant had expended very heavy costs, the recovery of which she was entitled to. These costs amounted to about $8—.

If the rents only continued as they were when Mr. Hennen bought the property, for the sixteen years ending in 1860, when this judgment was rendered, they would have amounted to nine thousand six hundred dollars.

More than *seven years* have elapsed since the rendition of this judgment, which would swell these rents, at the above rate, to $13,800, and the marshal of the Court has waited in vain for an order to take steps to collect this really large moneyed judgment in the shape of rents and costs.

Why has no effort been made to collect, from Hennen, these rents and costs?

That question will answer itself after stating some other facts.

The piece of real estate thus lost by the defendant, Hennen, has been for many years past uniformly assessed for municipal taxes, in the city of New Orleans, at a valuation of about $6,000. After the marshal had placed the complainant in possession of the property, Hennen brought his action in warranty against the Carrollton Railroad Company for *nineteen thousand and fifty dollars.*

When Mr. Hennen purchased the lots in question from the Carrollton Railroad Company, the price was paid, not in money, but in certain shares of the capital stock of the Company, which were taken at par, but upon which only fifty dollars (*or half*) per share had been paid. This fact appears from an inspection of the Hennen Record, (vol. 1, p. 15,) in this Court. It is a fact readily susceptible of proof, that when the Hennen suit was tried, the real estate in question had depreciated, and the shares of stock had increased in value.

In his petition in warranty against the Railroad Company, he estimates the value of the stock at $19,050, and asks judgment for that sum. Taking the city assessment of $6,000 as the value of the real estate, and Mr. Hennen is a clear gainer of *thirteen thousand and fifty dollars* by the *loss* of his suit, with the complainant, *provided the complainant should not pursue him for the rents and costs*, which the Record of the Circuit Court of Louisiana shows *she so far has not done*.

The general repute of Mr. Hennen, (lately deceased) was that he was a wealthy man; while that of the complainant, on the contrary, was that of an heir, *seeking*, but not yet in possession of, an estate.

Why is it that the complainant has been put in possession of the land, but no steps taken to collect the rents and costs?

A very important question in this controversy was, and is, the good or bad faith of the defendants as purchasers. Hennen was the clerk of the Circuit Court of Louisiana in 1841, and for many years subsequently, and therefore had full knowledge of the alleged rights of the complainant; because they passed under his eye, as the Record attests, and he was held to be a possessor in bad faith. Yet, if he was not to be pursued for the rents and profits, he had no real interest in the question. Is it fair or just, then, that the other defendants, who are to be pressed, should be concluded as possessors in *bad faith*, by the decree in his case?

All we ask is a fair and full hearing. What we earnestly protest against, is having the decision rendered in the Hennen case, which this Court of course supposed Hennen was really contesting, being used against us, when his interest was to lose it.

Can the complainant be permitted to refer to this decree thus rendered, as *res judicata*, upon the question for instance of the complainant's *status*, declaring her to be Clark's "legitimate and only child," when it is manifest that Hennen did not care a fig whether such an expression was contained in the decree

or not; and when, too, his opposition, or even his attention, might have excluded it from the decree, inasmuch as it was not asked for in the pleadings—the complainant's bill only asking for recognition as *instituted heir?*

We appeal to Your Honors in the name of the large number of defendants, many of whom are poor people; and in view of the utter ruin these defendants will suffer if the principles embodied in the Hennen decree are enforced against them without a hearing—to grant them an opportunity of being heard upon the evidence in the record, with the mind of the Court free from the prejudice of that decree.

The lamented jurist, now resting from his earthly labors, who penned the opinion of the minority of this Court in the case under consideration, said:

"It is most manifest, from this record, that the fragment of a cause brought here by Mrs. Gaines and Mr. Hennen, by stipulation, will, in effect, decide, *and was intended to decide*, the cause of the other defendants, sued jointly with Mr. Hennen, and who are standing helpless, awaiting their fate at the hands of this Court."

See 24 Howard, page 622.

The italics in this quotation were those of the Judge himself, in the original, and indicate the depth and force of his meaning.

The amount of property involved in the Hennen case was trivial, when compared with the enormous interests at stake in the issues pending and yet to be decided by this Honorable Court, but which we are told are concluded, and that the Court will not hear argument, because these cases are brought up upon *substantially* the same pleadings and evidence; and this forsooth, notwithstanding the fact that Hennen's interest was to let the complainant gain her suit.

The other defendants have a very different interest from that which actuated Mr. Hennen; and as their counsel we respectfully ask to be allowed a full hearing in their behalf.

The issues are not the same. In some instances, particularly in the case of the City of New Orleans, the source of title is not the same.

The pleadings are different also. But the great fact patent upon the face of the reasoning in the Hennen case is that some of the most important defences were not brought to the notice of the Court at all, and those which were stated were not sustained by references to the proof in the record.

Now we submit that upon such a question, for instance as that of Clark's marriage—the most vital in the cause—the opinion in 24 Howard, furnishes conclusive proof in itself, that the evidence introduced by the defendants and fully argued in the Circuit Court, could not have been seen or considered by this Court. Testimony upon this point of the most conclusive and overwhelming character, was in the record. But as it is perhaps the most voluminous record ever presented in any tribunal, being nearly three thousand printed pages, with a large quantity of other matter in original, no judge, or judges of any tribunal, however desirous of doing justice, however patient and laborious they might be, could find out the proofs to sustain the defences without having special and particular references, and the Court should not have been compelled to discharge such a task without the benefit of briefs or argument of a full and searching nature.

The unhallowed attempt to fasten this really *ex parte* decree as *res judicata*, upon the great body of the defendants, who would thus be robbed of a vast amount of property, and perhaps impoverished without a hearing, cannot be strengthened by the circumstance that Mr. Janin made an argument on a few of the issues. It was an imperfect argument, for the reasons already stated. But his connection with the case ceased when the *opinion* was read. He had no possible interest in nor control over the *decree* entered up subsequently to the reading of the opinion, certainly not more than Mr. Brent or Mr. May had over the decree in the Patterson case. And a most remarkable link in the chain of evidence establishing the simi-

larity of Hennen's case with that of Patterson's, is the fact that the *decree* in the former is with a few necessary changes a copy of the latter, *although the bills upon which they were rendered are essentially dissimilar.*

We ask Your Honors' particular attention to the circumstance, that in the Hennen case, although the complainant in her bill, therein states that "her claim as heir-at-law was finally decided against her in 1852," and only asked to be recognized *as instituted heir* under the will of 1813, still more, *far more than she asks*, was given to her.

If that decree had conformed to the prayer of the complainant it would have declared her Clark's instituted heir simply. But on reading it, we find that she is declared to be "the legitimate and only child," and entitled to all the rights of the same—*besides* being the universal legatee—which is in direct contradiction of the decree in 12 Howard, p. 539.

We will recur hereafter to the character of this claim as instituted heir, to show that Mary Clark is forced heir, and its effect. We mention it now only as illustrating from the decree itself, that the Hennen case, reported in 24 Howard, was no better certainly than what this Honorable Court pronounced the Patterson case to be—when it held that "the decree of this Court in Charles Patterson's case, does not affect these defendants for two reasons: 1st. Because they were no parties to it; and 2d. Because *it was no earnest controversy.*" 12 Howard, 539.

When the Patterson case was being tried in this Honorable Court, he, through his counsel, denied that the suit was a collusive one. See 6 Howard, p. 575.

Mr. Hennen, if living, would no doubt make a similar denial; yet, now, as then, the facts show that the controversy was *amicable*—as between him and the complainant—that it was not *real litigation*, or in the language of the Court, not an *earnest controversy.*

Whatever name may be given to it we care not—but in the name of the *hundreds* of defendants whom as counsel we repre-

sent, and against whom this complainant has already filed suits in the Circuit Court of Louisiana, from whom property to the value of *millions* is claimed, we ask to be heard upon the law and the evidence in these cases, now before this Court for consideration, with the mind of the Court free from the prejudice created by the decision in the Hennen case.

The case of *Wright, et al.* v. *Sill*, 2 Black's Rep., p. 544, shows the class of cases in which this Court will not re-examine a question once decided—a naked question of law—repeatedly adjudged, and upon which the Court said argument had been exhausted, which is very different from the case now presented.

We wish the defendants to have accorded to them a full and impartial hearing, such as was granted them in 1852, that resulted in the decision reported in 12 Howard.

With such a hearing, they will be satisfied with any decree this Honorable Court may render, and we submit this portion of their case in the confident belief that this Honorable Court will consider the whole of the facts and render them full and ample justice.

IV.—The complainant seeks to recover, simply as *instituted heir* under the will of 1813. She does not describe herself as the child of anybody, well knowing that her claim as the legitimate child, or *forced heir* of Clark, was definitively adjudged against her by the decision in 12 Howard, 539, which reads "therefore complainant is not the lawful heir of Daniel Clark, and can inherit nothing from him."

Her present claim as *instituted heir* is very different, and much less dangerous. Because, Clark's mother who survived him, must have been his forced heir, if the complainant was not, and, as such, entitled to two-thirds of her son's estate at his death; and of this portion, or *legitime*, he could not deprive her by will. Code of 1808, p. 212, art. 22.

The will of 1813, therefore, if valid, can have no operation upon the two-thirds inherited by the mother of the testator as forced heir.

The only way possible for the complainant to have excluded the mother's title to two-thirds of her son's estate as his forced heir, was to allege, and prove, if possible, that she was Clark's legitimate child, and as such, his forced heir, to the extent of four-fifths of his estate.

This was precisely what she tried to accomplish in the litigation, which in 1852 terminated with the decision, reported adversely to her in 12 Howard. The complainant's learned counsel well knew the superior value of the claim as forced heir, to that of the claim as instituted heir. Its loss, at one single dash, divested her of all claim absolutely to two-thirds of the entire estate. From the moment that the decision rendered in 12 Howard was pronounced, the title of Mary Clark to two-thirds of the estate of Clark, as his mother and forced heir, could no longer be contested by the complainant.

But there was another very important distinction in the rights given by law to the *forced*, over the *instituted* heir. Mary Clark as *forced* heir was "of full right *seized* of all the property of the succession," and the complainant as instituted heir, if recognized as such, is bound to demand of the forced heir, the delivery of the property; that is, the disposable portion.

Code of 1808, p. 234, art. 122. See case of Ripoll v. Morina, 12 Rob. 553.

In another portion of this brief we have considered the titles of the defendants as derived from Mary Clark, as instituted heir under the will of 1811, and as having accepted the estate and been placed in legal possession of it, by her power of attorney to Chew and Relf, in which she expressly assumed the quality of heir according to art. 77, p. 162, Code of 1808. But we have now shown that as mother and *forced heir* of her son,

Daniel Clark, she was "*of full right seized* of all the property of the succession."

If therefore, we concede for argument sake, the complainant has shown that she has rights as instituted heir, she must, in the language of art. 122, Code of 1808, p. 234, "demand the delivery of the property," to which she is entitled, from the forced heir, who had the seizn and possession of the estate.

Let the complainant, therefore, as instituted heir, no longer pretend to disturb purchasers who hold their titles from the forced heir of Clark. If she has been wronged, her remedy is to pursue that forced heir, Mary Clark, or her heirs.

Such is the strictly legal view of the rights of the complainant as instituted heir.

The titles of the defendants as derived from Mary Clark, are further strengthened by the consideration, that when the succession of her son, Daniel Clark, was opened, she was, by the conduct and representations of Clark himself, held out to the community as his *apparent* heir. She was *known* to be his mother; and he represented himself and was universally regarded a single man. When the will of 1811 was probated, she accepted his estate and went into possession under that will as his universal and *instituted* heir; and, until the complainant arose to dispute the fact, she was considered his *sole* heir. The decision in 12th Howard finally established her as his legal or *forced* heir, because it decided that the complainant was not Clark's lawful child, and could inherit nothing from him. If Clark had no lawful child, it is undeniable that the mother was the forced heir; unless it is in reserve for these unfortunate defendants to come in collision with some *other* "legitimate and only child" yet unknown, certainly the complainant can no longer lay claim to that *descriptio personæ*, if there is any virtue in the decree of this Court in 1852.

V.—It is necessary that we should obtain a correct view of Clark's financial condition and of the business relations which subsisted between him and Daniel W. Coxe, of Philadelphia, and Chew and Relf in New Orleans, which finally resulted in the articles of agreement or *partnership* of June 19, 1813.

To do so, it will be proper to ascertain from the record when their business relations began, as well as their purpose, extent, history and results.

This review will not only establish the verity of these articles of agreement, but will throw light upon other questions at issue; light drawn not from fiction, but from the actual intercourse, correspondence and agreements of Clark himself, with Coxe, and Chew and Relf.

Daniel W. Coxe was a wealthy merchant residing in Philadelphia. He formed a business connection with Clark in 1792 in New Orleans, the purposes of which were, as Coxe informs us in his testimony, a "general commercial business and speculations in lands," (vol. 2, p. 414). This business was carried on in Louisiana under Clark's name. In 1801 Chew and Relf became associated with Coxe and Clark in their business, (vol. 2, p. 700), and the four so continued, Coxe being the capitalist, Chew and Relf attending chiefly to the commercial business, and Clark to the speculations in land.

All the real estate bought in Louisiana, of which there was a very large amount, was purchased in the name of Daniel Clark, though paid for with the funds originally supplied by Coxe, as conclusively appears from the large indebtedness of Clark to Coxe, when they settled July 12, 1811.

After various vicisitudes and losses, a settlement was made on the 11th and 12th of July, 1811, of the joint interests of all four of these parties, by which Clark took the assets, assumed the liabilities and became the acknowledged debtor of Coxe, Chew and Relf in certain specified amounts, as the settlements show.

See R. 82, vol. 2, p. 620, ib. 426, ib. 430.

Chew and Relf being unpaid the cash sum of $50,000, due

to them by Clark, under the express terms of this settlement, (see vol. 2, p. 620), and being, of course, still bound for the debts of their concern, which had been assumed by Clark, but remained unpaid, they continued in business with him of necessity for their own security. Daniel W. Coxe being also unpaid and pressed by his creditors, was constantly importuning Clark to fulfil his engagement and pay him according to the settlement. (See vol. 2, pp. 426-430). The correspondence of Clark with Coxe in the last two years of his life, shows the utter wretchedness and misery to which he was reduced by his inability to pay Coxe or any of his creditors, or even to raise the necessary means to defray the current expenses of his mother, who was living at Germantown, Pennsylvania.

His own letters, quoted elsewhere in this brief to prove his insolvency, present his real condition just prior to the date of the articles of agreement. They show the speculator, caught with a vast quantity of real estate upon his hands, burthened with debt, which he took in his settlement with Coxe, because he was too proud to acknowledge that he had made bad investments of Coxe's money.

Yet, after he had in July, 1811, taken the title to it all, in his name as real owner, property amounting, according to the schedule attached to the settlement (vol. 2, p. 430) to $551,040, some idea of the amount of obligations due on this very property, may be gathered from his offer to restore the whole of it back to Coxe, if the latter would give him $25,000 and assume his obligations.

See Clark's letter to Coxe, of June 29, 1812, vol. 2, p. 597.

Mr. Justice Wayne, who delivered the opinion of the majority of this Court in the Hennen suit, in 24 Howard, at page 558, speaking of the estate of Clark, says it is "shown by the proof in the cause introduced by the defendants, which had been registered or inventoried *a short time before Clark's death*, at more than seven hundred thousand dollars, in which Clark and Coxe were interested, and an estate exclusively belonging to Clark, of two hundred and ninety-six thousand dol-

lars." This would make Clark's estate worth half a million at the time of his death.

To disabuse the mind of the Court of this very grave error, let us examine the proof referred to by the Judge. It is found in the Record, No. 82, vol. 1, page 321 and 322, and consists of a statement entitled, "Statement of the affairs of Messrs. D. W. Coxe and Daniel Clark, on joint account," &c.

This document was written in 1808, but as it bears no date, Judge Wayne must have *supposed* that it "had been registered or inventoried *a short time before* Clark's death." A few observations will show the error as to its date. For instance, the "Houmas plantation," which figures in the statement at a valuation of $100,000, was sold by Clark to Wade Hampton, in the winter of 1810–'11, to raise funds for D. W. Coxe's relief.

See letter from Clark to Coxe, dated 1st March, 1811. R. No. 82, vol. 2, p. 489.

The statement was made while Clark owned this plantation, and we know that Clark, in his settlement with Coxe, July 12, 1811, used the notes given by Wade Hampton for this very place.

See receipt of Coxe to Clark for their notes, R. No. 82, vol. 2, p. 428.

The statement was evidently made in 1808, as it speaks of "goods on hand at Natchez, 1st Nov. 1807, as per inventory," and "goods on hand at New Orleans 1st January." It corresponds in many particulars with the one dated April 18, 1807, [R. 82, vol. 2, p. 435–36,] which was made by Coxe and Clark when they formed their agreement of same date, "to cultivate lands for joint account." See R. 82, vol. 1, p. 858.

Therefore, it would seem to have been made about the same period. On the other hand, it is entirely dissimilar from Clark's own statement of his actual condition, annexed to his settlement with Coxe, 12th July, 1811, [R. 82, vol. 2, pp. 429, 430,] which must be taken as the correct one, because made later and signed by Clark himself as correct. The Judge could not have had reference to the account filed in Probate

Court, because, although that showed some little real estate remaining unsold, it showed a balance of $9,166 68 to the debit of the estate. Nor could he have had reference to the inventory, because that included only Clark's *private* estate as distinguished from his partnership property, without, of course, stating what the debts were. But the most remarkable error of the Judge, consists in his failure to make any allowance for the *debts*, or to observe that the statement to which he referred made no allowance whatever for the debts. We have shown above that when Clark settled with Coxe in July, 1811, and became thereby the acknowledged owner of property valued at $551,040 00, it was so burdened with debt that he afterwards offered it all back to Coxe for $25,000. See letter of Clark to Coxe, June 29, 1812, R. 82, vol. 2, p. 597.

Clark was in the habit of sending Coxe, who resided in Philadelphia, a statement of their assets, *without debts*.

See his letter to Coxe, 7th September, 1807, R. No. 82, vol. 2, pp. 464, 465.

The document relied on by His Honor, Judge Wayne, was such a statement, prepared evidently in the early part of 1808, showing simply a description of the property in Clark's name, or which he and Turner had on hand, without making any mention whatever of *the debts*.

It is, beyond a doubt, certain, that the attention of His Honor, Judge Wayne, was never called to the real pecuniary condition of Clark, as revealed by his own letters, and that he made no allowance whatever for Clark's debts. It is not surprising that the Court should have fallen into so grave an error, when the fact is considered that there does not appear to have been any portion of the argument for the defendant Hennen, devoted to this subject. And when a record of near three thousand pages of printed matter is before the Court, it is the duty of litigants to sustain their statements of facts by full references to the proof.

It is not our purpose to leave the question of Clark's insolvency in doubt. We have alleged it, and we will proceed to prove it. It is a matter of the highest importance that the

truth on this subject should be shown and impressed upon the mind of the Court, as it is the key for the solution of other questions.

We propose to take up Clark's correspondence with Mr. Coxe, Mr. Hulings and others, and from the unimpeachable record of his own pen, prove he was insolvent.

We have said that Coxe importuned Clark for funds due him. Let us read a few extracts from Clark's letters in reply:

Feb. 15th, 1811, Clark writes to Coxe: "My soul is harrowed up, and my mind so tortured with fear and apprehension since the receipt of your letter of the 2d ultimo by Chew and Relf, that nature cannot long support what I now undergo. My body is so affected by what I suffer in mind, that unless providence should relieve me, I must sink under it. *I would at this moment give the best and whole of the property I own for half the sum I should have taken the beginning of last week.*"

March 15th, 1811, he writes to Coxe: "I have received your letters of the 27th January and 6th February. I feel to the bottom of my soul all that you mention, but the horror and distress here are so great, and confidence so completely lost, that it is out of our power to do anything either for your immediate relief or our own. On your fate depends mine, and on mine that of Chew and Relf, as the credit of the one is supported by the other. * * * *One consideration only weighs down my soul in agony and despair: my mother and her family in a foreign country, without friends or protectors; for God's sake, entreat your friends to provide for them, until I can take measures to do so, which will be ere long. I may myself become an outcast*, but with a little time and *management*, there will be more than enough to pay every one to whom we are jointly or separately indebted."

Seven days later, March 22, 1811, he writes to Coxe: "If the same total want of confidence which now prevails should continue, and any more failures take place in which we should be only involved for even a few thousand dollars, we could not

raise them, such is our situation, and such the situation of almost every one in trade here. * * * *I have only one favor to ask of you—to continue to assist my family until I can make arrangements to do it myself, as at present I could not remit them a dollar from hence.*" etc.

These letters with others of the same tenor will be found in R. No. 82, vol. 2, pp. 489 to 492 inclusive.

Clark is thus shown from his letters, to have been in such embarrassed circumstances, as to have to pen such urgent appeals to Mr. Coxe and his friends, "*for God's sake to provide for his mother and family.*"

Shortly after writing these letters, Clark went to Philadelphia and effected a general settlement of the joint affairs of Coxe, Clark, Chew and Relf, as is evidenced by the articles of agreement of July 11, 1811, between Coxe, and Chew and Relf, represented by Clark as their attorney, (R. No. 82, vol. 2, p. 620), and on the succeeding day, the agreement between Coxe and Clark personally, (R. No. 82, vol. 2, p. 426), together with the private explanatory agreement, (vol. 2, p. 610). From the perusal of these three papers it will be seen, first, that all the property of the joint concerns, a detailed statement of which was annexed, (ib., p. 428), was to belong solely to Clark upon certain fixed conditions, to which we draw special attention, so far as they related to Chew and Relf.

In the first place he engaged to discharge all the debts of the house of Chew & Relf, and in addition became their debtor in the sum of $25,000 each. In the next place he became the debtor of D. W. Coxe in the sum of $300,000, half of which he secured by notes and bonds of Wade Hampton. Clark also engaged to pay Coxe $4,500, yearly, during his natural life, subject to certain conditions.

A very large portion of this debt was secured by special mortgage and lien on the property transferred.

Thus it is seen that when Clark returned to New Orleans with these settlements in his pocket, although they constituted

his title to property estimated by Chew and Relf in their statement, at $551,000, (ib. p. 430) there was really but little or no margin left after the payment of the debts with which the property stood charged.

We will now show, by his own correspondence, shortly after the date of these agreements, what Clark thought of his own financial condition. He then had the paper title to property valued at more than half a million, *less* his debts. He was certainly poor enough before he went to Philadelphia, as the above correspondence shows. His letters on his return to New Orleans, show that his debts still haunted him, and that his pecuniary condition had not improved.

He writes to Coxe from New Orleans, 13th September, 1811: "You will learn from them (Chew and Relf,) not only the embarrassments they have labored under, but also that they were obliged to appropriate to their use, before my arrival, the fund on which I principally depended, and which I stated to you as the sole resource I could rely on for the present."

In his next letter, dated 18th Oct., 1811, writing to Coxe, he says: "The situation of the country is really distressing." * * * * "I would give my heart's blood to relieve you, but I solemnly assure you that since my arrival, I have not received a dollar," &c. R. No. 82, vol. 2, pp. 493, 494.

We will add one extract more. It is taken from Clark's letter to Coxe, dated at New Orleans, June 15th, 1812, only fourteen months before the writer's death. "I would (not) now have written to you, as I could not for the moment forward you the complete statement which I wish, were it not to put an end to your complaints about my silence: *for I am heart broken and have nothing new to say.* After you shall have received my next, I will leave you to say yourself what I am to do, and *believe me that if I could now sacrifice the little I have left, and after paying everything, only reserve wherewith barely to keep me from starving in any other country, I would do it in an instant, to escape from the hell I have lived in for the last eighteen months.*"

R. No. 82, vol. 2, p. 575.

These letters written *only a year before his death*, furnish us with a view of the money status of the merchant prince and land speculator at that time—not a fancy sketch drawn from the imagination half a century after his death, but a vivid picture of the truth drawn by the writer himself; and none could know his pecuniary condition better than himself. After the perusal of the last extract given above, the reader is prepared to anticipate Clark's suicide, as a relief from his financial troubles.

If we should rest the investigation into the question of Clark's poverty at this point, the complainant relying upon the statements of "anile gossips" might claim that Clark's condition had greatly improved within the last year of his life. We will therefore proceed to show that Dr. W. E. Hulings of Philadelphia was requested by Clark to become the channel of his remittances to his mother, then residing in Germantown, Pa. That Hulings consented, provided Clark would keep him regularly supplied with means, as their applications would otherwise be painful. (See letter from Hulings to Clark, 1st January, 1812). That in September, 1812, his mother through Hulings, informed him she was considerably in debt, did all she could to economise, but would soon be in want of a further supply.

Oct. 30, 1812, Hulings writes to Clark: "Your mother is in need of funds, on which subject I have before written you."

Jan. 6, 1813, Hulings writes to Clark another dunning letter, stating he had been compelled to make an advance, as they were "in such want," and adds: "It is very unpleasant for me to know that Mrs. Clark is in need, and not to have it in my power to supply her, more especially as I gave you timely information of her situation." * * * "I do trust that you will make such arrangements as will enable me cheerfully to discharge my agency."

R. No. 82, vol. 2, p. 851.

We admit that Clark *appeared*, by his settlement with Coxe, in July, 1811, to have the legal title to land valued at over half a million, and the counsel for the complainant turns to this and similar evidences of his great possessions, and exclaims: "Can it be possible that Clark, *thus* shown to be worth *half a million* in real estate, could have agreed to give Chew and Relf each an undivided third interest in this *vast property*, when his indebtedness to them amounted to only $50,000?"

Only a few days since, a New York bankrupt placed in court his schedule, solemnly attested as true, on which the debits amounted to $4,000,000, and the assets to—nothing. His embarrassments were attributed to unlucky speculations, of different kinds.

Clark's speculations were in land, and if the resources of the country had not become crippled and distressed by the war with Great Britain, it is possible his expectations of increase in the valuation of the lands purchased might have been realized. He was doomed to bitter disappointment, as we have fully demonstrated in another portion of this brief.

Well, he is proved to have offered a re-transfer of the title to this half a million of lands, to Coxe, if the latter would give him $25,000. But what was he to do with Chew and Relf, who were his creditors to the extent of $50,000? Something had to be done for their ease.

The perusal of Clark's letter to Coxe of June 29th, 1812, vol. 2, p. 597, shows that Clark's pecuniary condition was then so hopelessly embarrassed that the question was not whether it could be possible that he would make an agreement with Chew and Relf, but rather whether the latter would release Clark from his indebtedness to them for an undivided interest in the real estate, thus overwhelmingly burthened with debt. The perusal of the articles of June 19th, 1813, considered in the light of the real facts of the case, show that Clark had the best of the bargain. His real estate was already bound for more than its value, and by the articles of agreement with Chew and Relf, he induced those gentlemen to become bound with him for

all his liabilities, and cancel their claim against him in consideration of an undivided third each, of such real estate or other assets *as would remain after the payment of the debts.*

Such was the real situation of these parties when the articles of agreement of June 19, 1813, were formed. The Court in this view of Clark's embarrassments, may be led to doubt the fabulous wealth, "the wondrous story of the Merchant Prince," --the illustrious descendant of the Irish kings, [Vide Bellechasse, P. R. p. 161,] who, though worth a million or more, could not supply the wants of his own aged mother. It may also begin to seriously question the oft repeated story, that Chew and Relf, more particularly the latter, coveting the glittering wealth of this millionare, forged his name to pretended articles of partnership; suppressed his real will, and defrauded his "legitimate and only child," out of the *millions* which they received and the child lost.

When the complainant's fiction that Clark owned half a million in real estate, *with no debts*, gives way to the real fact disclosed by the evidence that his debts exceeded his assets, the Court is prepared, not only to understand why the articles of agreement were formed between Clark, Chew and Relf, but to appreciate the difficulties and embarrassments which surrounded Chew and Relf, when, as Clark's surviving partners, and as the agents of his mother, Mary Clark, they toiled and labored for long years in the endeavor to make the property thus left at Clark's death, in which he had an undivided interest with them, yield sufficient to pay the debts, and leave a surplus.

VI.--*The articles of agreement* of June 19, 1813, upon their face divested Clark of title to all the real estate in his name, with two specified exceptions. It then provided that after the payment of all debts of the concern, including those of Daniel Clark, "the *remaining property should be equally divided between the parties, each one third.*" Vol. 2, p. 701.

We will hereafter, in considering the *effect* of this agreement, show that the property now sought to be recovered by the complainant, belonged to this *concern*, and that as Clark's interest was *an undivided third* after first discharging the debts of the concern, so the settlements and accounts of Chew & Relf, the survivors of the concern, which have been received and approved by the Probate Court, show that the identical property now sued for has been sold, and the proceeds applied to extinguish the debts of this concern; and that no one representing Clark or succeeding to his rights, can be allowed to attack the validity of sales contemplated and rendered necessary by this agreement.

Guided doubtless by the advice of her counsel, who said that this paper would be fatal to her pretensions, the complainant has boldly declared that the signature of Daniel Clark thereto was forged—a dangerous plea, if the proof of forgery fail—for then the effect claimed is conceded.

Nine experts were examined by the Court, and much time consumed to show that Clark's signature was not genuine—in the face of the fact that there were two attesting witnesses, one of whom wrote the body of the instrument. The fallacy of attempting to prove forgery by comparison was never more completely exemplified. The complainant selected from among the very numerous notarial acts signed by Clark, and the four most dissimilar of course to those of the "articles." As is usual in such cases—the experts produced by the complainant on comparing the signatures condemned, while the experts produced by the defendants sustained the signature in question. We will give one sample of the faults found. The complainant's expert John V. Childs, said: "I find in this signature to the articles of partnership, that it is the only one that has the "l," final of Daniel, and the initial "C" of Clark connected." On cross-examination the witness was shown the signature of Clark to the articles of settlement between him and D. W. Coxe, 12th July, 1811, and also to the signature of Clark to a great number of letters proved by the testimony of H. W. Palfrey

and others, to be genuine, and after examining them, he testified that the final "l" and initial "C" were connected in all the signatures the same as in the articles of 19th June, 1813.

See testimony of J. V. Childs, R. No. 82, v. 1, pp. 221 and 222.

The complainant was unable to produce any witness familiar with Clark's handwriting to sustain her objection, and certainly there were numerous parties then living in New Orleans, who were acquainted with his signature.

Why did she not produce some one of them?

In attacking the signature of Clark to these articles as a forgery, the complainant has confessed their importance as well as the weakness of her case.

Fully aware of their importance, the counsel of Chew and Relf had the original articles deposited with L. T. Caire, a notary public, April 12th, 1841, and when thus deposited, F. Dutillet and H. W. Palfrey, the two attesting witnesses, appeared, and being duly sworn by the notary, declared that "the signatures of Daniel Clark, Beverly Chew and Richard Relf have been written in their presence."

See R. No. 82, v. 2, p. 702. When this trial was had in 1858, Dutillet was dead, but *his signature*, as an attesting witness, was duly proved by T. Guyol.

R. No. 82, v. 1, p. 889.

While the other subscribing witness, Palfrey, was produced in Court, reaffirmed what he had sworn to before the notary, and explained at length all the circumstances attending the act, hesitating as to preciseness, and in some details on account of the great lapse of time. Mr. Palfrey says he was, at the date of these articles a clerk in the employ of Chew and Relf, and drew the instrument himself, and it appears, made it in duplicate.

See testimony of Palfrey, R. No. 82, v. 1, pp. 876, 880.

When the genuineness of Daniel Clark's signature to these "articles" was being discussed in the Circuit Court, the distinguished Judge then presiding, held that the oath of either

of the attesting witnesses to the fact established it, unless their character for veracity was impeached. This was not pretended or attempted. The propriety of this ruling is too manifest for discussion, and it was only through a superabundance of caution that testimony was introduced by the defendants to rebut the mere *opinions* of the complainant's experts, based upon a comparison of handwriting. The rebutting proof will be found in the testimony of H. W. Palfrey, vol. 1, pp. 874 and 879, of Henry Caire, ib. 883, of Theo. Guyol, ib., p. 887, of Mr. Duncan, ib. p. 865, and the certificates of the two attesting witnesses, F. Dutillet and H. W. Palfrey, annexed to the act of deposit before L. T. Caire, Notary, vol. 2, p. 701.

The counterpart or duplicate of these articles of partnership seems after Clark's death to have gone into the possession of Mr. Geo. Green, his nephew, and one of the heirs.

Probate R., p. 182, item 12.

Mr. Green, was not only interested, but a member of the bar, and visited New Orleans to attend to the interests of his wife as one of the heirs of Clark's estate. He did not question the genuineness of the signature of Mr. Clark to these articles. (See his letter in Probate Record, p. 108). On the same page will be found the letter of Joseph Reed, executor of Mary Clark, in which also these articles of partnership are treated as genuine. These were intelligent men, one sworn, and the other interested to protect the rights of the parties, who then supposed themselves to be the heirs of Clark; and the substance of their united request to Mr. Relf was, that *the estate should be settled and divided agreeably to the articles of co-partnership.* One of the complainant's counsel says these articles of partnership never saw the light until 1834. Yet these letters of Messrs. Green and Reid were written in 1828, on the occasion of the visit of the former to New Orleans, when he doubtless inspected them. And the complainant has herself introduced in evidence, the account books of Chew and Relf, which of themselves fully establish the partnership.

Daniel W. Coxe, in his testimony speaks of Chew and Relf as Clark's surviving partners, (vol. 2, p. 925). And the same witness speaking of the debt due to him by Clark, says: "It was ratified and confirmed by the articles of co-partnership between the said Chew and Relf and the said Daniel Clark, dated 19th of June, 1813, a copy of which articles is also hereto annexed, marked G, and verified by my initials. The originals of these agreements and account current are in the possession of the said Chew and Relf."

Testimony of Coxe, vol. 2, p. 936.

Another remarkable and singular proof of the genuineness of these "articles" is seen in an endorsement made by Mr. Coxe on the paper, showing agreement between himself and Clark to cultivate for joint account. The endorsement reads: "Superseded and annulled by the agreement of final settlement between D. W. Coxe and Daniel Clark, of July, 1811, as ratified and confirmed by Chew and Relf, *executors and surviving co-partners of D. Clark, under their agreement of May or June*, 1813, *with him, etc.*"

Vol. 2, p. 859.

This memorandum found among the papers of Mr. Coxe after his death, is proved to be entirely written by him.

See testimony of Mr. Duncan, vol. 2, p. 872.

It is very unlucky for the complainant that the same witnesses who, as experts, proved the signature of Clark was not genuine, should not have stopped there. They are also made to prove that the signature of Beverly Chew to these same articles is not genuine. That this appears from the fact that the little pieces of paper upon which the "seal" is placed opposite the signatures of Clark and of Chew, are of "different paper" from that of Relf's "seal," being "smooth with no lines passing through;" while "the lowest seal (opposite to the signature of Richard Relf) is of an uneven paper having lines

passing through it, and in the same paper that the articles are written on."

See testimony of complainant's witnesses. John V. Childs, No. 82, vol. 1, p. 221. Schmidt, ib., p. 204. John Douglass, ib. 210.

Now if the Court will turn to the testimony of Mr. Duncan, the counsel of Mr. Chew, they will find that the latter not only frequently said himself that his signature to these articles of partnership were genuine, but swore to the fact in his answer.

See testimony of Mr. Duncan, No. 82, vol. 1, p. 867.

Thus, is readily foiled, the attempt to fasten upon Mr. Relf, the opprobrium of preparing forged articles of agreement with his partners, Daniel Clark and Beverly Chew.

Some minor objections are made to the articles of agreement which a very slight examination will refute. For instance, that Clark paid Chew and Relf all, or nearly all of the $50,000, shown to be due them, by the agreement of July 11, 1811. This is answered not only by the failure of proof to sustain it, but by the positive admission of Clark in the articles of June 19, 1813, that "it had been impossible to carry into effect" the agreements previously made, (referring to those of July 11 and July 12, 1811).

R. 82, vol. 2, p. 700.

It is further objected that in none of the acts of administration, sales, etc., do Chew and Relf mention the existence of these articles, or of their interest in the property, but that they describe themselves always as executors, or as agents of Mary Clark, never as *partners* of Daniel Clark. That the pretence of their "articles of partnership" was not heard of until the account was filed by Chew and Relf in the Probate Court in 1838, etc.

These and many such like objections are readily dispelled by an examination of the account books of Chew and Relf, *introduced in evidence by the complainant herself.*

Elliott Robbins, referring to the "stock account" of Clark in these books, says: "It is placed there, I think, expressly to make it appear as if Daniel Clark was a partner agreeably to the terms of the partnership agreement of 19th June, 1813."

R. 82, vol. 1, p. 163.

Chew and Relf then showed this fact as far back as 1813.

These books of Chew and Relf begun in 1813, and continued while the estate of Clark was under administration, show that they settled the estate of Clark precisely in accordance with the articles of partnership. They did not, in making titles, refer to the partnership, because it was unnecessary, since (as stated in the answer) the paper or legal title stood in Clark's name; and because, as stated in their petition addressed to the Probate Court, under the advice of counsel and with the assent of the attorney for absent heirs, "the partnership property of the firm of petitioners (Chew and Relf) with Clark was excluded from the inventory of the private estate of the said Daniel Clark, and that alone inventoried which appeared to belong to said Clark individually," of both which they then rendered a full account to the Court.

See Probate Record, p. 83.

It is said that the account books show that Chew and Relf had profits, and Clark had none. We are content to let the books explain themselves. The partnership debts exceeded the assets, and therefore, neither of the partners *as such* could get any profits; but Chew and Relf were certainly entitled to commissions for settling the estate, and it is the appearance of this item and a few others like it in the books, which were supposed by the witness Robbins to be "partnership profits."

See for example, the entry in Journal, p. 275.

Another objection is that upon its face the "articles" do not embrace all the property standing in the name of Clark (with

the exception of the two pieces specified), but only that property "arising from the late concern of D. Clark, or Chew and Relf."

This is the weakest of the defences resorted to after the failure of the attempt to blacken Mr. Relf's character with the crime of forgery. After being beaten fairly upon the *real* issue, which was the question of the genuineness of these articles, a cheerful surrender of trivial objections might have been expected. The refutation of this objection needs but a perusal of the article itself. How does it read? That in lieu of the sum stipulated in the agreement before referred to, dated the 11th of July, 1811, fixing the *profits* of Beverly Chew and Richard Relf, they be, from this day, concerned jointly and co-equally with Daniel Clark *in all the property, debts*, etc., held either in their own name, (this is the first), or in that of Daniel Clark's, (this is the second), *or in Daniel Wm. Coxe's in this country, arising from the late concern of D. Clark*, and *Chew & Relf*," &c., (this is the third.) There were thus seen to be *three* distinct kinds of property thrown into the partnership; 1st that of Chew & Relf; 2d, That in the name of Clark; and 3d, That in the name of either one arising from these transactions, *in which Coxe had an interest.*

This construction is confirmed by what follows. Clark excepts two pieces of property *only* from going into this partnership. 1st. The house on the Bayou road, and 2d, the Wilkins estate, which two are "acknowledged to be said Daniel Clark's *private* property," thus clearly distinguishing these from all the rest, which was partnership property. But all doubt is removed by the concluding sentence, which reads thus: "After the payment of the debts of the concern, *including those of Daniel Clark's*, of which there is a schedule hereunto annexed, and a final settlement and payment of the balance that may be due D. W. Coxe, which payment is to be made out of the general funds, *then the remaining property, either of lands, debts or other effects, to be equally divided between the parties, each one third.*"

See articles, R. 82, vol. 2, p. 701.

Discussion would be superfluous, in the face of such plain English as this.

It is said that the defendants are estopped from setting up this outstanding title of Chew & Relf, as evidenced by the articles of partnership, because they acknowledge in the answers that the title originally came from Clark. The familiar principle, that parties are estopped from denying the validity of the original title under which both litigants claim, has no application to the present state of facts. For in the same answer it is distinctly set up that although Clark did originally own, &c., he divested himself of his title, by signing the articles of agreement of June 19, 1813, which transferred the whole title to the partnership, in the proportion of one *undivided* third to each of the three partners. The answer, therefore, shows that Clark had no title except to two pieces of his private estate, specified in these articles.

VII.—*The account, approved by decree of the Probate Court.*—The complainant is estopped, so far as relates to these defendants, by a regular decree of the Probate Court of New Orleans, rendered 17th April, 1841, homologating the final account of Chew & Relf, so far as not opposed.

See this decree, Probate R., p. 129.

In 1834 the complainant had filed her petition requiring Chew & Relf, as executors, to render an account. Vol. 2, p. 708. Her attorneys discontinued her demand for an account, when it was ascertained that its rendition would demonstrate the utter insolvency of Clark's estate.

See complainant's amended bill of July 2d, 1844, R. No. 82, vol. 2, p. 25.

See also opinion of Judge Caton, 24 Howard, p. 624.

This account was filed 27th August, 1838, by Chew & Relf, as executors of the estate of Daniel Clark; was submitted in

the Probate Court contradictorily with A. Hoa, Esq., an attorney at law appointed by the Court to represent the absent heirs. According to the law of Louisiana, the complainant was duly cited through the service made on this attorney for absent heirs.

See C. C. 1204 et. seq.

Publications were made of this account, and on 17th April, 1841, it was duly homologated, so far as not opposed.

See Probate R. pp. 83, 84 and 129.

Oppositions to this account were filed by Caroline Barnes, Sarah J. Campbell. P. R., p. 111. Boisfontaine, ib. 117. R. R. Keene, ib. 121, and among others by A. Hoa, Esq., the attorney appointed to represent the absent heirs.

P. R. pp. 116 and 117.

The reasoning of Judge Wayne in 24 Howard, 570 and 571, entirely overlooks two important facts:

1. The filing of this final account, and its due publication contradictorily with an attorney appointed by the Court to represent the absent heirs; and

2d. The homologation of the account so far as not opposed.

This decree is conclusive of all property then accounted for.

Will this tribunal treat such a decree of the Probate Court of New Orleans as a nullity? Will it not on the contrary treat it as binding and conclusive upon all the matters contained in the accounts, until the decree is attacked and set aside in the Court by which it was rendered.

"The homologation of a tableau is *res judicata*, as to all the items, except those which have been opposed."

7 N. S. 643.

"An executor's tableau of distribution and account concludes all matters it includes. * * * The notification of the filing of the tableau operates as a citation to

all persons contained therein, creditors *as well as legatees*, and the homologation of the executor's account and tableau is *res judicata*, and bars all further enquires as to all matters included in the account."

Succession of Ant. Peytavin, 10 Rob. 118.
See also 1 La. 371; 1 An. 92; 3 An. 532; 12 An. 337; 13 An. 113.

The rule laid down by this Court in the case of *Leffingwell* v. *Warren*, 2 Black, p. 599, relative to following the construction given to State laws by the Supreme State Tribunals, is of value in considering the effect to be given to the order homologating this account.

It is a decree of the Probate Court of New Orleans, possessing exclusive jurisdiction of the succession of Daniel Clark. The decrees of this Probate Court, rendered in the course of the administration of Daniel Clark's estate, are no more liable to review in a court of equity, than is the *ex parte* decree of probate of the will of 1813.

If this Court is bound to receive the latter, is it not required to give effect to the former also? for the jurisdiction of the Probate Court is as exclusive in the one case as in the other. What stability would obtain in the settlement of estates, if these decrees of the Probate Court homologating accounts, rendered in the settlement of estates, can thus be treated as nullities. It is too manifest for argument, that if this decree of homologation is to be attacked, it must be by a proceeding in the Court that rendered it.

Your Honors will find by turning to the Probate Records, that this decree was rendered after due publication; that the account of Chew and Relf, as executors, was approved contradictorily with A. Hoa, Esq., the attorney for the absent heirs, an office created by the law of Louisiana, in order that estates that may be settled contradictorily, so far as relates to all absent heirs through him as their representative.

See Civil Code of 1825, Arts. 1204, 1213.

We beg that Your Honors will pause long enough to read the petition filed with this account. It will be found in Probate R. p. 83.

It explains briefly and clearly, in the shortest possible compas the true condition of Clark's estate, the reason why Clark's individual property was inventoried, and his interest in the partnership property was not; the reasons for the long delay in settling the estate, and the efforts to preserve it for the benefit of the creditors and all interested.

The purchase price paid by the defendants, or those under whom they hold, has been appropriated to *the payment of the debts and liabilities of Daniel Clark's succession.*

See answer R. 82, v. 1, p. 53.

The same therefore inured to the use and benefit of the representatives of the succession whoever they were.

Therefore, the defendants maintain that this purchase money thus paid by them or those under whom they claim, was distributed among the creditors of the succession in the said final account; that the decree approving said account is a judgment *in rem* by a court of competent jurisdiction, and is binding on the complainant, and has the force of the thing adjudged.

Certainly complainant's claims merely as instituted heir, are not superior to those of Clark's creditors. Have not these defendants the right to hold up this final account, evidencing the fact that the funds paid by them for the identical property now sought to be recovered, was actually received by the creditors of Daniel Clark's succession under an order of the Probate Court, in an account published and approved according to law. The Probate Record shows these facts very fully.

The account books kept by Chew & Relf, which have been brought up here in original, were introduced in evidence without qualification, by the complainant, not only confirm the entire truthfulness of this final account filed in 1838—for the account is but a rescript from these books—but they (the books),

fully prove the fact that the property sued for was sold, and the proceeds applied to the discharge of the debts of Daniel Clark's succession. This is demonstrated by inspection of the books; so that the complainant has, herself, placed before the Court the very proof which Mr. Justice Wayne, in 24 Howard, said was necessary in order to sustain the account of Chew & Relf.

The last and most technical objection to the final account of Chew & Relf is that they were *functi officio*, and had no authority to act as executors when the account was filed—and therefore, although the property might have gone to pay Clark's debts—the complainant is not bound.

Let us see if this objection is sustained by authority. In the case of Moore et al. vs. Thibodaux, 4 Annual, 74, the account of Moore, Tutor, was opposed, on the ground that he "had no authority to receive the funds of the succession or to pay its debts," and the Supreme Court of Louisiana held: "*It is true he (Moore) acted without authority; but, having acted, the first question to be determined now is, whether the funds were applied by him as the law would have applied them.* Many things are forbidden by law to be done, which, when done, become valid and binding. When Courts of Justice have any discretion, they will not disregard an illegal act, if they could not do so without enabling parties to commit a fraud.*** "

" Without going into any inquiry as to the manner in which the payments were made, *if the debts paid were due by the succession*, the defendant must be credited with those payments in his settlement with the heirs."

In 3 La. 523, it was held, that "the heir has no just cause of complaint if a just debt be paid."

The account of 1838, did not, then, suddenly spring into being from the pen of the executor, as has been intimated. It was, as stated, a rescript from the account books written up daily and continuously from the period of the commencement of the partnership, two months before Clark's death, to the

final settlement of the estate—as the books which are in evidence show.

An important consideration shown also by the account and the books, is the fact that there were the living heirs and representatives of Clark's estate, ever watchful of their own affairs, interested to see that their rights were protected, and to whom accounts were regularly rendered.

A reader of the bill of complaint, would infer that Chew and Relf had appropriated an estate of which there were *no heirs*, except the complainant who was a minor. The important fact is left out of view that Mary Clark, the mother and apparent heir, during her life, and her heirs, supposed at least, that they were the only parties on earth who had any interest in the settlement of Daniel Clark's estate.

The books of Chew and Relf, as well as the final account thus approved by the Probate Court, were scrutinized and approved by the living heirs of Mary Clark, especially by Mr. George Green, the husband of Jane Green, a sister of Daniel Clark. They appear to have been regularly rendered to Mary Clark, while living, and to her executor after her death.

See Probate Record, p. 104, and the account books.

The letters from her executor and from George Green, who visited New Orleans, and personally examined into the condition of the estate, (see these letters in Probate Record, p. 108), must remove all doubt as to loss or injury done to any of Clark's heirs. The fact obvious to Jos. Reed, the executor, and to Mr. Green, was, that after the creditors were paid, there would be but very little left for the heirs.

The assets, according to this account, were less than the debts. The complainant asks an order for the restoration of the real estate described in these accounts from defendants, who show that the purchase money has inured to her benefit by discharging to that extent the debts of this estate of which she claims to be the heir.

We have fully shown, in treating of the *renunciation* made

in 1848, that it is no answer to this view—to say that the defendants had notice by the bill of 1836, of complainant's claims as instituted heir. If that constructive notice had any virtue, it was destroyed by the renunciation made in 1848.

VIII.—It is manifest also, that the complainant, if recognized as instituted heir under the will of 1813, would only be entitled to claim the *unadministered* property of Clark's estate.

Judge Wayne seems, in his reasoning in 24 Howard, to sanction this view. His language is: "It makes no difference that a part of the estate has been administered under the first probate. The unadministered must be done under the second."

This seems to admit that the second probate, to wit: the will of 1813, can take effect only on that portion of the estate, which appears at the time of the probate to remain unadministered, and yet this correct reasoning, was departed from in the decree, and the defendant was ordered to surrender property which figures in these final accounts, the very proceeds of which, went to discharge the debts of the estate.

If Courts of equity can thus, after the lapse of more than a quarter of a century, set aside such decrees of Courts of probate, then, there is no safety whatever in the titles to property, and the very purpose for which these Courts have been created and vested with exclusive jurisdiction, is annulled. This view is so manifestly just that we are not surprised to find that the complainant, herself and her then husband, W. W. Whitney, on the 18th June, 1834, filed her petition in the Probate Court of the parish of Orleans, and after formerly admitting, that Mary Clark had during her lifetime accepted the succession of Daniel Clark, and asking that her heirs be made parties defendant; asked also that the executors, Chew and Relf, be cited, and ordered "to render a full and true account of their administration of the said estate, and *to surrender the property which remains in their possession unadministered*," * * * , and further "to pay over to her all sums of money which may have

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been by them received, and *to which they may not be entitled to a credit, in the settlement of their accounts with the said estate of the said Daniel Clark.*" R. 82, V. 2, p. 709.

It did not then enter into the imagination of her counsel that she could do more than to pursue the instituted heir, who had accepted the estate, and recover what was left *unadministered* of the estate.

IX.—*The account books of Chew and Relf.*

These books were offered in evidence by the complainant. (See entry, R. 82, vol. 1, p. 96.) They contain very important proof for the defendants, and need to be specially noticed.

The complainant's witness, Elliott Robbins, whose specialty, it seems, was to hunt up any and every thing calculated to cast suspicion and odium upon the character of Mr. Relf, made a series of extracts from these account books, which will be found strung along here and there in his testimony. See R. 82, vol. 1, p. 157 et seq.; ib. p. 163 to 176 inclusive; ib. p. 184 et seq. A few of the more chosen of these "extracts" have crept (inadvertently, of course) into the Probate Record. (See pp. 216–223.)

The witness Robbins interlards these "extracts" continuously with his "opinions," which he supposed would have the weight of evidence. The harmless effort to get before this Court a few extracts construed to suit the opinions of Mr. Robbins, signally failed. (See R. 82, vol. 1, pp. 914 and 923.) And the complainant's counsel anticipating that such *secondary* evidence would not be received, was reluctantly compelled to offer the books themselves.

It was fortunate for the defendants that they were so offered. Because they contain in themselves conclusive and satisfactory evidence upon several points at issue, which would otherwise have been left doubtful.

Among other matters, they establish:

1. The validity of the articles of agreement of June 19,

1813, between Clark, Chew and Relf, by which each became co-equal owners of all the real estate in Clark's name, with two specified exceptions.

This is shown by the fact that the books were opened on the 21st June, 1813, *before* Clark's death. After his death an account was opened with his estate, and also a "stock" account with Clark, and a general stock account.

To any bookkeeper, a simple inspection of the books demonstrates the existence of the partnership.

Robbins says, referring to Daniel Clark's "stock account" in these books: "It was put there, I think, expressly to make it appear as if Daniel Clark was a partner agreeably to the terms of the partnership agreement of 19th June, 1813." Well, if it was put there, according to the complainant's witness, expressly to show this fact, and the complainant introduces the books in evidence as genuine, the fact may be taken as proved. There are several entries in the books directly referring to and proving the partnership. See, for example, Ledger, p. 379, and Journal No. 2, p. 26, in reference to the item of $14,000.

2. These books fully prove that all the real estate left by Clark was sold by Chew and Relf, *and the proceeds applied to the payment of Clark's debts.*

The account filed in the Probate Court was taken from these very books, as their comparison will show.

In the Hennen case, Judge Wayne, evidently referring to this account, speaks of it as unsupported by proof.

See 24 Howard, p. 571.

Had his attention been called to these account books, introduced in evidence by the complainant herself, he could not have said so, as we will show by a few references.

The account will be found in Probate Record, p. 84–106.
The general stock account in the Ledger, p. 379.

By turning to the entries in the two Journals, indicated in

the Ledger, every item of real estate can be traced out readily.

Take, as an illustration, the property now sought to be recovered from the City of New Orleans.

It will be found in the account on page 94 of the Probate Record, described under the head, "proceeds of a sale of real estate," as follows:

"A tract of cypress swamp on Canal Carondelet to Crerarte (Evariste) Blanc, $4,760."

On examining the Ledger at p. 379, and the Journal at p. 429, we find the sale regularly entered, and the proceeds applied to the payment of Clark's debts.

3. These books distinctly prove that Mary Clark not only "accepted" the succession of her son, Daniel Clark, but that Chew and Relf remitted her moneys, honored the draft of herself and her agent Mr. Hulings, paid debts for her, etc.

See Journal, pp. 224 and 275. Ledger, p. 158.

The amounts received by her as shown by these books were small, because Clark's debts were large. The account in the Probate Court showing a balance to *debit* of the estate on 31st December, 1827, of $18,050 38c., (see Probate R., p. 104), which debit balance was reduced by sales and collections to $9,166 68c. in July, 1838, when the account was filed in Court.

4. Finally, these books show that the estate of Clark was honestly and fairly settled by Chew and Relf. That it was overwhelmingly in debt and every foot of ground in which he was intrusted was fairly sold, and the proceeds applied to the creditors.

X.—*Effect of Probate of Will of* 1813.

1. This Court will not give a greater effect to the order probating the will of 1813 than it would receive in *the Courts* of the State of Louisiana.

See case of Leffingwell v. Warren, 2 *Black*, *p.* 599. Mills v. Duryee, 7 Cranch, p. 481. Hampton v. McConnell, 3 Wheaton, p. 235. McElmoyle v. Cohen, 13 Peters, p. 326.

In the case of Gaines and Wife v. Relf, decided in 1844, this Court said: "The Courts of the United States have involved no new or foreign principle in Louisiana. In deciding controversies in that State, the local law governs the same as in every other State."

2 Howard, p. 650.

2. The effect to be given to this decree is qualified by the express language of the decree itself. The Court rendering it held, "the plaintiff (complainant) presents to us a *prima facie* case, which entitles her to relief. The decision which we make does not conclude any one who may desire to contest the will with her in a direct action, and to show that no such will was executed. *On the other hand, a refusal to probate the will, places it beyond the power of the applicant to set up her rights under the will against any other person.*"

On a rehearing, the Court, referring to the foregoing, said:

"We have been referred to an expression in the opinion read, wherein we say, that the decree which we make (admitting the will to probate) does not exclude any one who may desire to contest the will with the applicant in a direct action, and to show that such will was executed. *This must not be understood as expresssing the opinion that other means of defence may not be used as by way of* ANSWER OR EXCEPTION, WHENEVER THE WILL IS SET UP AS A MUNIMENT OF TITLE."

See opinion in Record, pp. 213–214.

The Supreme Court of Louisiana, in the recent case of Provost vs. Provost, reported in 13 Annual Rep., page 574, deciding upon the effect to be given to an *ex parte* decree of probate, used this language:

"It is perfectly well settled that such a decree is not conclusive upon the heirs not cited, and that, when set up as a

muniment of title against their claim for property belonging to their inheritance, the *validity* of a will *thus probated, may be called in question* by them *collaterally.*"

See also the following cases—Sophie vs. Duplessis, 2 An. 725; Suc. of Dupuy, 4 An., 572; Suc. of Duplessis, 10 Rob., 196; Robert vs. Allier, 17 La., 14; O'Donegan vs. Knox, 11 La., 388; Aubert vs. Aubert, 6 An., 104; Abston vs. Abston, 15 An., 137.

Under the statutes of the State of Louisiana, as interpreted by all these and numerous other decisions of the Supreme judicial tribunals of that State, a decree of probate, obtained *ex parte,* does not preclude an inquiry into the validity of the will whenever set up as a muniment of title. The defendants are not compelled to resort to a direct action to annul the will. *This was so expressly decided* in the case of Provost vs. Provost, 13 An., 574, above quoted, and also in Abston vs. Abston, 15 An., 137.

This then is the rule of property relative to the effect to be given to *ex parte* decrees of probate in Louisiana, and as such admitted to be binding upon this Court by the decisions in the recent cases of Leffingwell vs. Warren, 2 Black, 599. and Nichols vs. Levy, 5 Wallace, 444.

3. The Supreme Court of Louisiana have further held that "the probate of a will *ex parte* could not give validity to such dispositions in the will as were in violation of the prohibitions of law and the settled policy of the State."

Same case of Provost vs. Provost, 13 An., 574–576; Jung vs. Doriocourt, 4 La., 175.

According to the principles of these decisions, this Court will look beyond and behind this *ex parte* probate of the alleged will of 1813 to find the fact whether Clark was not prohibited by law and the public policy of the State of Louisiana from making any will in favor of the complainant, because she was in fact the offspring of an illicit intercourse.

It is clear, then, that these defendants are not precluded by this *ex parte* decree of probate from invoking those provisions of the law of Louisiana which strike with nullity any acknowledgement, even in a probated will, made by a father of his *adulterous* offspring. See the Code of 1808, page 48, article 26.

It mattered not how such acknowledgement was made, whether by subsequent marriage, or by act before notary and witnesses, *or by last will.*

The law absolutely deprived the adulterous child of the *capacity* of inheriting. Code of 1808, p. 156, art. 46.

If, therefore, the status of the complainant was in this proscribed category, and proof of that fact is brought to the knowledge of this Court, the last will, though probated with an acknowledgement of legitimacy contained in it, can be of no benefit to her, if she is the bastard child of the testator.

See case in 11 La., Annual Rep., p. 694.

Such is the law of the State of Louisiana, as interpreted by its supreme judicial tribunal, which this Court recognized as binding on it in the case quoted from 2 Black, page 599, and 5 Wallace, 544.

4. In 1844 when the complainant presented her claims, both as heir-at-law, and under the will of 1813, she was directed by this Court to suspend her action until she had established the will of 1813 and *revoked that of* 1811. This Court instructed her "to make formal application to the Probate Court for the proof of the last will and the *revocation of the first*," "to procure the requisite action *on both wills*," etc.

See decision Gaines, et ux, v. Chew, et al., 2 Howard, p. 646.

This decision clearly required that when application was made by the complainant for the probate of the will of 1813, she should, at the same time, demand the revocation of the

probate of the will of 1811, and that then proceedings should be had contradictorily with parties having an opposing interest. That such was the meaning and intention of the Court is rendered absolutely certain from the concurring opinion of Mr. Justice Catron, who said: "The will of 1813 cannot be set up without a destruction of the will of 1811. This will has been duly proved, and stands as a title to the succession of the estate of Daniel Clark; nor can the Circuit Court of the United States set the probate aside. This can only be done by the Probate Court."

2 Howard, p. 651.

The complainant refused to comply with these *instructions*. She well knew that in any action brought by her to revoke the probate of the will of 1811 for *fraud* or other legal cause, or to ask the probate of the alleged will of 1813 contradictorily with parties of opposing interest, she would fail, as she had already in 1834 brought suit for these purposes in the Probate Court of New Orleans, and after taking testimony and seeing the prospect hopeless, had *voluntarily abandoned it*.

See Record No. 82, v. 2, pp. 708 and 781–2.

XI.—*The renunciation of her claim under the will of* 1813, made by the complainant in her amended bill, filed 28th November, 1848, is a complete defence to her present action.

We will first show the *fact*, and the incidents which led to this abandonment, and then consider its effects.

1. It will be remembered, that in 1834, the complainant brought a suit in the Probate Court to procure the probate of the will of 1813. Taking a nonsuit in the State Court, she renewed her claim by a bill filed in the Circuit Court in 1836. (vol. 2, p. 1.) When that bill came before this Court she was told, as we have already shown, to return to the Probate Court and "make formal application for the proof of the will of 1813, and the revocation of the will of 1811." This decree was rendered at the January term of this Court in 1844. Instead

of complying with this reasonable and very proper order, we find that, on the 2d of July, 1844, she filed her amended bill, in which she stated that "she had already made application to the Court of Probates, parish of Orleans, for the probate of the will of 1813," but that Court "could not exercise the powers or jurisdiction of probating a will unless the same was produced in open Court." She then complained of the existence of prejudice against her by the Judges of the Probate and Supreme Courts, and concluded with a statement that these reasons "preclude your oratrix from again resorting to it, *unless the answers of the defendants to be had herein may render it advisable.*"

See amended bill of July 2, 1844. R. 82, vol. 2, p. 26.

It was, in the opinion of this Court, necessary to obtain these answers of the defendants, Chew and Relf, especially in order that they might, in the words of the Court, "*be used as evidence before the Court of Probate* to establish the will of 1813 and revoke that of 1811."

See Gaines vs. Chew, 2 Howard, p. 645.

On the 14th January, 1845, the answer of Chew and Relf was filed, which this Court said was to be used as *evidence* as above stated, and we now quote from it that portion which, doubtless, convinced the complainant of the utter hopelessness of any further attempt to establish the will of 1813, and was the true cause of her making the formal renunciation of her claim under it, as really worthless in itself. We present this answer of Mr. Relf also as the vindication of his character from the false charge that he suppressed the will of 1813.

The extract reads: "The defendant, Richard Relf, saith for himself and for his individual answer to that and all parts of the said bill and amended bill of complainant's, which charge that a will of Daniel Clark's, made in 1813, in favor of the complainant, Myra, came into the possession of this defendant, Richard Relf, and that he, the said

defendant, Richard Relf, fraudulently concealed, suppressed, or destroyed the same, or caused it to be concealed, suppressed, or destroyed, and that he, this defendant, Richard Relf, did substitute in its place (the place of the alleged will of 1813) or stead, the said will of 1811, and such other like charges, whether made directly, or insinuated by implication are all and each of them, wholly, entirely and singly *unfounded and false.* * * * That this defendant, *Richard Relf, not accepting the waiver of his oath, which has been made* in the said bill of said complainant's, but availing himself of it in this and all other respects, *does in the most solemn and sacred manner on earth, declare in language most unqualified, that said charges in said complainant's bill and amended bill have not, in any respect whatever, any truth in them, and it is wholly false that he, the defendant, Richard Relf, ever saw any will made by Daniel Clark in the year* 1813, *either before or after his, the said Daniel Clark's death,* nor did he believe, nor had he any reason to believe, that any such, or any other will was ever made by said Daniel Clark, other than the one dated in 1811 as aforesaid." Then follows the answer of Mr. Chew to the same effect.

See answer in R. 82, vol. 2, pp. 50 and 51.

This denial by Mr. Relf in "the most solemn and sacred manner on earth," in direct response to the charges in the bill, did not seem, in the opinion of the complainant, to "render it advisable" to make another effort to probate the alleged will of 1813, and therefore, on the 28th of November, 1848, she filed another amended bill, in which, for the purposes of that suit, she *renounced all claims which she had made to the estate of Daniel Clark as his universal heir and devisee by the will of* 1813.

For the exact language of this renunciation, the Court is referred to the said amended bill, at pages 78 and 74 of R. 82, vol. 2.

She insisted, however, upon the *fact* that the will of 1813

was made solely as containing a declaration of her legitimacy. And as she went to trial upon this issue of fact, and her bill containing that issue was dismissed in 1852, that decision is plead in the answer as a bar against her claim. And it certainly is neither lawful nor equitable to force a second trial of precisely the same issue of fact upon these defendants.

2. Having shown that the complainant formally renounced her claims under the will of 1813, and the reasons why she did so, let us consider the legal effects of that renunciation upon her present claim.

Article 3485 of the Louisiana Code of 1825, is in these words: "If the plaintiff in this case, after having made his demand, *abandons* or discontinues it, the interruption shall be considered as having never happened."

One effect of this renunciation or abandonment was then to re-establish the running of prescription in favor of the defendants, precisely as if the suit to interrupt it had not been brought. She did not again claim the succession of Clark as heir under the will of 1813, until 1855, which was *forty-two* years after it was opened by Clark's death in 1813. It is therefore barred, as more than thirty years had elapsed.

See succession of Zacharie, 12 An. 97.

The only pretence of an answer to this conclusive proposition is, that when she abandoned her claim under the will of 1813, she insisted in the *fact* that a will had been made, as proof that Clark acknowledged her as *his legitimate child*, and that this operated as an interruption of prescription. A proposition so weak in itself requires no answer. Its mere statement refutes it.

3. But there is another important effect which this renunciation had upon the present claim. In another portion of this brief we present the defence that the identical property, now sought to be recovered, was sold to pay Clark's debts, and that the money was so appropriated, and among other proof of this,

we present the final accounts of Chew and Relf, filed in the Probate Court in 1838, showing these facts, which account was duly published and *homologated*, so far as not opposed, by a decree of that court in 1841.

See Probate Record, p. 129.

To this equitable and legal defence the complainant answers: that the filing of her bill was notice to the world that she claimed the estate as heir under the will of 1813, and, therefore, those proceedings do not affect her. Is not such an answer untenable when the fact now presented is considered, that by her amended bill she "renounced her claim as heir under the will of 1813?" If the notice of the claim was valid, was not the notice of its renunciation equally so? Under the law of Louisiana, above quoted, it is precisely as though she had given no notice. Therefore, when this account was filed and homologated, so far as not opposed, there was no notice, legally speaking of her claim, because the renunciation waived it.

4. Let us view the matter in another light. After this final account had been filed, as stated, containing upon its face a description of the property sold to these defendants, and appropriating the money paid by them for it to the discharge of the debts of Daniel Clark's succession, the complainant not only had constructive notice of the fact, but was legally cited through the attorney appointed to represent the absent heirs. The complainant then, with *legal notice* of the account and the decree approving it, renounced her claim as heir under the will of 1813. These proceedings, therefore, in the Probate Court, were had not only in the absence of legal notice of the complainant's claim now sued on, but it is further shown that with due legal notice of these proceedings, she tacitly sanctioned them by a formal renunciation of rights as instituted heir.

5. That the complainant had full knowledge, as well as legal notice, of these proceedings in the Probate Court, is shown by the fact that, she had herself, demanded account from Chew and Relf, and afterwards discontinued her prayer, only because in

the language of Mr. Justice Catron she "found Daniel Clark's estate to be *insolvent on the accounts exhibited.*"

See 24 Howard, p. 624.

XII. *The charge in the bill, of fraud by Relf, and notice of it by the defendants.* The learned counsel for the complainant, well aware of the power of this tribunal as a court of equity, to examine into all the facts of the case to prevent injustice and wrong, saw the danger of placing in evidence the decree of probate of the alleged will of 1813, unaccompanied by the proof upon which the order of probate was granted. They have accordingly presented in evidence the "Probate Record," and rely upon it to sustain the *equity* of their cause. The equitable view presented in the bill is, that the complainant has been deprived of her rights of property as heir of Clark, and that mainly, if not entirely through the fraud committed by Mr. Relf, one of the executors of the will of 1811. That the estate was settled and sales made fraudulently under the *revoked* will of 1811. She further alleges in her bill that the defendants were parties to the frauds of Mr. Relf, because they had knowledge of the same.

See bill, vol. 1, pp. 4–5.

As these charges were denied, under oath, by the defendants in their answer, it is incumbent on the complainant to establish by proof, not only the fraud alleged, but *notice* of it to the defendants.

She has done neither—simply because it was not in her power. We challenge her able counsel to a contest upon this issue. We deny that there is a particle of reliable proof to sustain the allegations that Mr. Relf suppressed the will of 1813, and fraudulently procured the probate of the will of 1811, because he was named as executor in the latter, or that as executor he mismanaged the estate of Clark, or divested one dollar of it from its proper destination.

See the sworn answer of Mr. Relf, R. 82, vol. 2, p. 50.

If there was no fraud on the part of Richard Relf, if he acted honestly and with fidelity, then the complainant, according to her present bill and every bill filed by her since she begun this extraordinary litigation, has no standing in court.

The presumption of law was, that Clark had destroyed the alleged will of 1813, because it was not found at his death.

See the case of Loxley vs. Jackson, 3 Phillimore, 116, possessing a remarkable similarity of fact to the present one.

This presumption had to be overcome, hence the charge that Mr. Relf suppressed the will of 1813, and caused that of 1811 to be probated.

Let us examine the Probate Record offered by the complainant, and see what were the facts. It appears from the proces verbal (translation in P. R. p. 254) that Mr. Relf had the seals affixed upon all the papers of Clark at 6 P. M., of the 16th August, 1813, the day of Clark's death. We know that at 2 o'clock, P. M., of that day, Clark was well enough to sit up and give directions to a messenger to attend to the delivery of some negroes, whom he sold to John McDonogh. On the return of this messenger, a few hours after, he informs us that he "saw Mr. Relf standing on the gallery; he was *weeping*, and he said to me, he, (Clark) is dead."

Testimony of Jean Canon, v. 2, p. 387.

It is positively certain, therefore, that the seals were affixed to the effects of Clark almost immediately after his death; and this was done, the proces-verbal itself informs us, *at the request of Mr. Richard Relf.*

Let us now read what this important paper tells us of the decedents last will; we quote its words: "At the moment of closing the proces-verbal, the said Richard Relf having found in a trunk of the deceased his olographic will, *we* (not Relf) removed it in presence of the witnesses above named, for the

purpose of delivering it to the Honorable the Judge of the Court of Probates."

See Probate R. p. 255.

Thus, it appears that Mr. Relf *found the will of* 1811, *in a trunk of the deceased, and that too at the moment of closing the proces-verbal.*

Gallien Preval, the justice who took the *proces-verbal,* testifies that "from the manner in which the *proces-verbal* is drawn up, deponent is inclined to think that *Relf must have taken the will out of the trunk in presence of him, Preval.* It was not a custom with deponent to allow any person but himself to examine the contents of trunks of deceased persons."

This testimony was given on cross-examination, Preval being then introduced as a witness *against* Mr. Relf.

Testimony of Preval, given in 1834. Probate R. p. 82.

It is noticeable that this witness when examined *ex parte* by the complainant in 1855, appears to have a fresher memory of incidents transpiring in 1813 than he possessed in 1834. After forty-two years had passed, he could recall incidents forgotten twenty-one years before. Under the operation of the *ex parte* examination, the memory appears to have been strengthened rather than impaired by the lapse of time. This is no impeachment of the veracity of a witness. It simply illustrates—what every Court knows—that *ex parte* testimony is to be received only in exceptional cases, and then with extreme caution.

Here the complainant introduces it to prove her allegations of fraud. It can receive but little weight for any such purpose.

After the will was found, the Justice who affixed the seals immediately took possession of it, "for the purpose of delivering it to the Honorable Judge of the Court of Probates." Thus it is seen that it was not Mr. Relf who presented the will even for probate.

The proceedings had in Court the next day, as appears from

the Probate Record, p. 12, do not show that Chew or Relf were either of them present. Judge Pitot, who had received custody of the will from the Justice, presented in open Court, not an open will which Mr. Relf might have previously read, but to use the exact words from the proof, "*a packet folded up as a letter,* SEALED with a red wafer, which I (Judge Pitot) presented to them (the two witnesses, Lanuser and Sere), and bearing the following subscription: 'This is my olographic will. New Orleans, 20 May, 1811. Daniel Clark.' * * Whereupon I, the said Judge, caused the said packet *to be broken open,* in which was found one writing page," etc. And thus it was that the sealed packet, containing the will of 1811, was taken to Court and probated, not by Mr. Relf but by Preval, Judge Pitot and De la Croix, who are acknowledged to have been interested in finding the will of 1813. It will be observed also that these gentlemen were invited by Mr. Relf to act as the witnesses in making the proces-verbal, as appears from the instrument itself.

It is certain that Mr. Relf resided with Clark, both before and during the last illness of the latter. (See testimony of Remy and Canon, R. 82, vol. 2, p. 81.) It is also attested by these witnesses, and by Boisfontaine, Sere and many others, that Clark's confidence remained unimpaired in Relf to the last, and that Mr. Relf was incapable of destroying a will. Jean Canon said he "did not believe Relf capable of destroying a will; he should have to witness such a thing, and even then he would not believe his eyes." R. 82, vol. 2, p. 81.

If Clark had been even suspicious of Relf, would he not have himself destroyed the will of 1811 with his own hands, before his death?

The fact that the will of 1811 was found in a *sealed packet,* with the superscription, "This is my olographic will;" which packet was found in Clark's trunk, when the proces-verbal was taken, on the afternoon of his death, strengthens the presumption of law that Clark destroyed the last will of 1813. It is very evident that he must have acted under the advice of

Mr. Mazureau, and being convinced that the proposed will in favor of Myra would be null, because of her illegitimacy, he destroyed the *projet* of it which he had drawn up. No other theory is reconcilable with the *fact* that the will of 1811 was found in his trunk, in a *sealed* packet, as above stated. If Clark had entertained half the anxiety represented that Myra should inherit his estate, and had not been convinced by Mr. Mazureau that she *could not*, because of her *status*, he undoubtedly would have destroyed the will of 1811.

So much for the charge of fraud. The constructive notice of fraud given by the filing of the bill in 1836, will be found to have been waived by her abandonment in the amended bill of 1848, the effect of which we have treated under the head of *renunciation.*

XIII.—The defendants and those from whom they derived title, were *bona fide* purchasers for a valuable consideration and without notice.

No reference to authorities is necessary in this Court to sustain this plea. Courts of equity will never fail to protect the purchaser with *legal* title whose conscience is clear.

That a valuable consideration was paid in each instance is admitted by the following stipulations: "It is admitted that each and every vendee did actually pay to his verdor the consideration money in manner and form as recited, (in the answers) and in cases where credit was given, such instalments were regularly paid at maturity."

Also—"it is stipulated and agreed to save unnecessary costs and delay, that the production in evidence of copies of notarial acts of purchase and transfers of real estate be dispensed with, provided that the facts to be proved by the introduction of such acts not already in evidence shall be sworn to by the defendants in their answers severally; the statements under oath of the defendants, in their answers, are to be taken and received in lieu of said acts."

It was also admitted that the defendants severally took public and unequivocal possession, under titles, as owners, which was continuous and uninterrupted by each vendee, except that possession in Mary Clark was denied by the counsel of the complainant.

See admissions, R. No. 82, vol. 1, pp. 86 and 87.

The admission of Mary Clark's acceptance and possession would have been fatal to the complainant's case, she was, therefore, careful to deny it in the stipulations referred to as well as in her present bill, because as the will of 1811 was in legal form and duly probated, it stands as a *just title*, and if it can be shown that Mary Clark, the instituted heir, had accepted and thus come into legal *possession* of the estate, she was invested with the legal title, and the complainant must seek for the redress she claims from the heirs of Mary Clark, and not from her innocent vendees. Certainly the good faith of Mary Clark has never been called in question.

The evidence equally places above dispute the fact that she expressly *accepted* her son's estate, bequeathed to her by the will of 1811.

The Code of 1808, p. 162, art. 77, declares: "A succession is accepted, expressly when the heir assumes the quality of such in some authentic or private instrument, or in some judicial proceeding. A succession is accepted tacitly when some act is done by which the intention of being heir must necessarily be supposed."

Mary Clark accepted expressly, by sending her power of attorney to Chew & Relf, in which she *assumed the quality of heir*.

In it she describes herself as the "mother and *sole heir, devisee and legatee* of Daniel Clark," etc. She authorizes Chew and Relf as her attorneys for her use and behalf, and in her name to take possession of and to hold, all and every part and parcel of the real and personal estate of the said deceased—to manage direct, bargain, agree for, and *make sale* of the same,

etc., * * * to ask, sue for, and by all lawful means recover all sums of money or debts owing, payable or belonging to me, as *sole legatee*, devisee, or *heir at law*, of the said Daniel Clark, deceased, or under, or by his last will and testament, etc.; * * * also to "make such acts and deeds as may be necessary for the conveyance of any real estate," etc. * *

See her power of attorney, Probate R. p. 72.

The decisions of the Louisiana Courts uniformly sustain the position, that when the heir in any private written instrument assumes the quality of heir, the succession is expressly accepted.

Article 77 of the Code of 1808, p. 162, is copied from Article 778 of the Napoleon Code. An examination of the French commentators fully sustain our position that Mary Clark's power of attorney to Chew and Relf was an express acceptance of the succession of Clark, because in it she expressly assumed the quality of heir.

An eminent writer on succession, says: "An acceptance may be in any private act whatever, in which the quality of heir is assumed."

Chabot des Successions, explanation of Art. 778 C. N.

When a power of attorney is sent by the heir authorizing the agent to do that which the heir is entitled to do, such as to sell property, or sue the debtors, etc., it constitutes an express acceptance.

Duranton, vol. 6, p. 459, n. 399.

The following authorities fully sustain this uniform view taken by the Courts of Louisiana on this subject:

Toullier, vol 4, p. 341, n. 324; ib. p. 359 n. 334. Duranton, vol. 6, p. 432 n. 373; ib. p. 434 n. 374. Vazeille on Successions, vol. 1, p. 139.

It was proper, of course, before the agents of Mary Clark made the sales of the real estate, that public record should be

made of their power of attorney authorizing them to do so. This was done by act of deposit before John Lynd, a notary public, 22d April, 1817.

See vol. 2, p. 665.

It is said the power of attorney should have been filed in the Probate Court.

Such a proposition in a Louisiana Court would not be treated as serious, because the simple act of acceptance vested the estate in Mary Clark. 2 N. S. 475. Frazier vs. Hill, 5 An. 113. This erroneous impression, that it was necessary to file it in the Probate Court, doubtless arose from the fact that the 7th sec. of the act of March, 1810, required that contracts of sale of real estate in Louisiana should be recorded in the office of the *Parish Judge*, and if not so recorded, should be null. This statute was inoperative in the city and parish of New Orleans, as was decided by the Supreme Court of the State of Louisiana in the case of Morris vs. Crocker, 4 Louisiana Rep. p. 149.

It was also decided in the case just quoted, that the notarial offices of the city were the proper places in which the record was to be made.

The complainant has judicially admitted the fact of Mary Clark's acceptance, so as to preclude her from further denial of it.

In 1834, aided by her then husband, Mr. Whitney, she filed a petition in the Probate Court of New Orleans, from which we extract this conclusive sentence: "Your petitioners further state that *the aforesaid Mary Clark, as they believe, during her life,* ACCEPTED *the succession of the said Daniel Clark.*"

See R. No. 82, vol. 2, page 709.

In her bill filed 14th July, 1848, (R. No. 82, v. 1, p. 580,) she states that "the aforesaid Mary Clark, of Germantown, in the State of Pennsylvania, the mother of the said Daniel Clark, deceased, being the sole devisee named in his said will of 1811, as your orator and oratrix are informed, did, on or about the 1st day of October, 1813, execute a certain

instrument in writing authorizing the said Chew and Relf, jointly and severally, to be her true and lawful attorneys, in her name to take possession of all and singular the said succession or estate of said Clark," &c. * * *

She proceeds to state that Mary Clark, after making her last will, died in June, 1823, names the heirs and executors, and asks that they be made parties.

A like admission will be found in her bill of July, 21, 1840. (See R. 82, vol. 1, pp. 594 and 595,) wherein she expressly admitted Mary Clark's title to the *one-fifth* part of the estate.

The Supreme Court of Louisiana has treated this power of attorney as an acceptance of Clark's estate.

See Heirs of Fletcher vs. Cavillier, 10 La. Rep. p. 119.

It is shown by the account books filed by complainant, and by the final account, that Mary Clark received money as heir of the estate.

Probate R. p. 88 and R. No. 82, vol. 2, p. 426.

The amount so received by her ($5,060 63) evidencing the meagre estate left after payment of the debts as shown in the account.

After Mary Clark had accepted the estate by sending out to Chew and Relf her power of attorney, she became, as we have shown, *ipso facto*, invested with the title or legal possession of the estate, and it was from this view of the case that the complainant's counsel in the Circuit Court urged that the power of attorney in question "was general and not special, as required by Art. C. C. 2966." They contended that this procuration conferred only administrative powers. The objection has force only when viewed as an admission by complainant of title in Mary Clark, the principal, for her agents were *expressly* empowered to sell and convey title, etc., as the perusal of the procuration shows.

The great misapprehension of fact which has been persistently advanced by the complainant, is that Chew and Relf settled

the estate of Clark in the capacity of executors *only*, and not as agents of Mary Clark. We have dwelt upon the proof of her acceptance, which occurred in less than two months after Clark's death, and upon the effect of that acceptance which was to transfer the title to her, because this is the true legal view of the case and relieves us from the necessity of referring to the abundant proof in the record to refute the calumnies expended upon the two gentlemen who had the calamity to be named by Clark as his executors.

The probated will of 1811 was a title translative of property, and the defendants derived their title in good faith as innocent purchasers from the agents of the heir, instituted and in possession under that will. It is true that these agents styled themselves in some of the acts as executors of the estate as well as attorneys in fact of the heir, and we will presently show why they did so. Still it will not be pretended that Mary Clark was for that reason any the less heir, nor that her rights, or the rights of those claiming under her, could be prejudiced by the fact, that, when her agents sold her property, they added, for greater certainty their title, as executors.

The titles from her agents are good, because Mary Clark held the actual legal title.

See case of Duplesse vs. White, 6 An. p. 514.

All other objections failing, it was pretended in the Circuit Court, and stated in the brief filed for the complainant before this Court on the trial of the Hennen case, that the sales under Mary Clark's power of attorney might perhaps have been good, "*had she been living when the sales were made in her name,*" and a note appended to the brief reads as follows: "It is shown by the admission of Relf's attorneys and Chew and Relf's commercial books that Mary Clark died in 1817 or beginning of 1818." It is certainly not to be wondered at, that this Court treated the sales of Chew and Relf as nullities if made by agents under a power of attorney which had been revoked by the death of the principal.

If the cause had been fully argued and these mistatements of facts corrected, and the corrections sustained by references to the proof in the record, the decision in 24th Howard would, we are satisfied, have been very different.

Mary Clark was not dead in 1817 or 1818. The sales under which the defendants hold, were made in 1820–1. Mary Clark died in 1823 at Germantown, in the State of Pennsylvania. This fact is proved by the testimony of D. W. Coxe, who was her neighbor and reliable friend. He says "she died in 1823." V. 2, p. 413, R. 82.

The date of the power of attorney from Jos. Reed, the executor of the will, proves it. V. 2, p. 538.

If further proof be required, we will supply it from the judicial declarations of the complainant herself, who alleges that Mary Clark died in 1823, in numerous bills.

See R. 82, v. 1, pp. 545, 560, 580, 690, 726, 747.

This is certainly sufficient to correct what was simply a clerical error.

We would beg to call the attention of the Court to the remarks and conclusions of Judge Catron on this subject, as reported in 24 Howard, pp. 623–625.

XIV.—It is with no feeling of pleasure certainly that we proceed to state the law and review the evidence in support of the defence set up in the answer—that the complainant is without capacity to take under a will from Daniel Clark.

1. We maintain that, at the time of her conception and birth, the complainant's mother was the wife of Jerome Des Grange, and if she be the child of Clark she must, for that reason, be his *adulterous bastard* child.

2. That she is the offspring of an *illicit* connection between Clark and Mrs. Des Grange, *there being no marriage whatever* between them, and therefore she is a bastard.

3. In either case, Clark was prohibited by law from making

a last will in her favor, and any such disposition was simply null.

We will first quote from the Code of Louisiana of 1808 the provisions applicable to the facts, as disclosed by the proof in the Record.

"Children are legitimate or bastards; legitimate children are those who are born of a marriage lawfully contracted; and *bastards are such as are born of an illicit union.*"

Code of 1808, page 8, Art. 4.

"Adulterous bastards are those who are born from an unlawful connection between two persons who at the time when the child was conceived were, either of them or both, connected by marriage with some other person." Ib. p. 44, art. 5.

Such children cannot be legitimated by the subsequent marriage of the parents. Ib. p. 48, art. 21.

"*Bastard,* adulturous or incestuous *children even duly acknowledged* shall not enjoy the right of inheriting (from) their natural father or mother in any of the cases above mentioned, *the law allowing them nothing more than a mere alimony.*" Ib. p. 156, art. 46.

"Natural fathers and mothers can in no case dispose of property in favor of their adultrine or incestuous children, even acknowledged, unless to the mere amount to what is necessary to their sustenance, or to procure them an occupation or profession by which to support themselves." Ib. p. 212, art. 15.

"Every disposition in favor of a person incapable of receiving shall be null," etc. Ib. p. 212, art. 17.

1. Such is the law of the State of Louisiana governing this case; and in making its application, we will first invite attention to the decision of this Court in 12 Howard—to the important *fact* there decided adversely to the complainant, and to its effect upon her *status*; after which we will review the evi-

dence of both complainant and defendants on the question of Clark's alleged marriage with Zulieme, because it is contended that the complainant may have been legitimate as to Clark if he married her mother in good faith.

It will not be denied that one of the precise matters decided in the case reported in 12 Howard, was the fact, that at the time the marriage between Clark and Zulieme is alleged to have taken place, she, the said Zulieme, was the lawful wife of Jerome Des Grange.

See 12 Howard, pp. 539, 506.

It is equally undeniable that this Court then held that, "*the first and most important of the issues presented, is that of the legitimacy of the complainant.*" 12 Howard, p. 506.

And that, after trying this *issue*, the conclusion of this Court was as follows: "*Complainant is not the lawful heir of Daniel Clark, and can inherit nothing from him.*" 12 Howard, p. 539, and 24 Howard, p. 576.

So far, then, as the same parties, or their privies, are now before this Court, those points are no longer open for discussion. Under this decision and the Code of 1808, p. 44, articles 1—6, quoted above, the *status* of the complainant is fixed. In his dissenting opinion, concurred in by Chief Justice Taney and Mr. Justice Grier, Judge Catron in the case of Hennen, held: "The only issue decided in the former suit was, whether the complainant's mother, for years before and at the time of Myra's birth, was the lawful wife of Jerome Des Grange. The Court so found, and based its decree dismissing the bill, on that fact. *The fact* being established, carried with it all the legal consequences that result from the fact. 1st. Starkie Ev. 182, sec. 57: One of the consequences is that *Mrs. Gaines was an adulterous bastard*, according to the laws of Louisiana, and *incapable of taking by the will of her father.*" See opinion in 24 Howard, p. 619.

When the case reported in 12 Howard was tried, all the

points now raised were made and elaborately argued by very able counsel, and the Court, after hearing the whole case, rested its decision upon the single point above quoted, which was declared to be "conclusive of the controversy." See 12 Howard, p. 539.

Judge Catron, who wrote the opinion, so interprets it, and the reasoning of the Court fully sustains him in the above assertion, that the *fact* then found of the existing marriage of Zulieme with Des Grange, established as a consequence, the *status* of the complainant.

Here then was a decree by this Court directly upon the personal status of the complainant, which was "binding and conclusive, not only upon the parties actually litigating in the cause, but upon all others," "it being essential to the peace of society that questions of this kind should not be left doubtful, but that the domestic and social relations of every member of the community should be clearly defined and conclusively settled and at rest."

1 Greenleaf on Ev., 524, 525. 2 Starkie Evid., 27, 28. 3 Bouvier Institutes, 574. 1 Phillips Ev., 328, 340. Burge, 90, 91, 92. 11 Annual Reports, 694, 59.

2. But it is contended that although the complainant be adulterine in fact, she may be legitimate for the purpose of inheriting from Clark, *provided he was actually married to Zulieme and in good faith so far as he was concerned.*

See reasoning of Judge Wayne in 24 Howard, pages 599 and 560.

It is therefore necessary, even under this view, before the complainant can take under the will of 1813, that this Court should be fully satisfied (according to the opinion in 24 Howard) that Clark was married to Zulieme, since, if there was no marriage, then the complainant was the issue of their illicit intercourse, and, as such, a bastard, (Code of 1808, p. 8, Art.

4), and could take nothing under a will if made.

We are willing to rest the settlement of this controversy upon the evidence in the Record on this single question of marriage. Very much of the most important testimony on this point was not brought to the attention of the Court, and, of course, not commented on in the decision in 24 Howard.

3. But first, let us ask, in considering this question of marriage, what effect is to be given to the statement of the complainant's legitimacy, imputed to Clark in the alleged will of 1813? Does it, as is contended, relieve the complainant from the necessity of proving a marriage? Certainly not.

It is at best but a weak presumption of the marriage when the facts are fully brought out and considered. The will was not produced, on the contrary, its contents were supplied by the dim recollections of conversations which a few old men and women say they had with Clark on the subject.

We learn from the letter of his legal adviser, Mr. Mazureau, that Clark had drafted "a rough sketch" of a second will, which he brought with him and exhibited to Mr. Mazureau, (see No. 82, vol. 2, p, 432,) and it was doubtless this "rough sketch" which these witnesses saw and speak of as his "will" of 1813. This "rough sketch" instituted Myra as his universal heir, though it called her his natural child, while the annuity of his mother was placed at $3,000 per annum, instead of $2,000, as stated in the alleged will of 1813. These two items sufficiently identify this "rough sketch" as the same paper which was seen by the complainant's witnesses and the faint memories of which, given *ex parte*, are manufactured into a probate will.

Let us examine more closely, and we find that Bellechasse and Mrs. Harper are the only witnesses who make oath to the contents of this will. The former contradicts himself. In a letter written by him to Mr. Coxe, dated Dec. 10, 1819, only six years after Clark's death, he informs us that *Mr. Relf was one of the executors under the will of* 1813. No. 82, vol. 1, pp 854--5. According to this letter, therefore, Mr. Relf had no

motive to destroy the will of 1813, because he was named as executor in it, and could as readily get the control of the estate (if such were his motive) under one will as the other. But according to the opinion of this witness, given many years later in life, Relf destroyed the will of 1813, because he was not named executor in it, and thus would get the control of the property. On this question of fact the greatest credit must attach to the letter, because it was written, without bias, to a third party, and at a time near to the period when the events treated of transpired.

The statements of Mrs. Harper, the other witness to the contents of the will, are contradicted by the testimony of P. A. Browne, Esq., of Philadelphia. He says: "I have been informed that the complainant has caused to be taken the deposition of Mrs. Harriette Smythe (formerly Harper), to the effect that Daniel Clark had made his will, and thereby left his estate to the complainant, and that he had called her "his legitimate child." Soon after the death of Daniel Clark in New Orleans, the said Harriett came from that place to Philadelphia, where she remained a considerable time, during which I had frequent conversation with her concerning the complainant, Daniel Clark and Col. Davis; in which conversation she, the said Harriet, uniformly represented the complainant to be the natural daughter of the said Daniel Clark, and the adopted daughter of Col. Davis. She said Harriet frequently narrated the circumstances attending the sickness, death and burial of Daniel Clark, and sometimes with great minuteness, even to the description of the clothes in which he was buried; but the said Harriet, in the said conversations, *never said one word about Daniel Clark having made a will in favor of the complainant, nor of his calling her his legitimate child.*"

See testimony of P. A. Browne, R. No. 82, vol. 1, p. 897.

4. Was Daniel Clark ever married to the complainant or not, is the vital question of this controversy? Unless this be

answered affirmatively the complainant can take nothing, even *as instituted heir*, as is plainly implied from the repeated declarations in the opinion rendered in the Hennen case.

See 24 Howard, pp. 600, 602, 613 and 614.

In our extended examination of this important question, we propose, first, to state fairly and fully the proof adduced by the complainant.

She presents but one single witness who pretends to have been present. This was the complainant's aunt, Madame Despau. Another aunt, Madame Caillavet, swears that Clark and Zulieme admitted the marriage to her. If the testimony of Mesdames Despau and Caillavet are left out of view, the complainant has really no proof whatever of the marriage, except the *inference* from the declaration of legitimacy in the *ex parte* will, which we have shown is utterly unreliable when the proof by which it is supported is examined.

How can Your Honors attach a particle of faith to the statements of Madames Despau and Caillavet, after the exterminating review of their testimony given by a full bench of this tribunal, with but two dissenting voices in the opinion, reported in 12 Howard, commencing on page 525. We commend it to renewed perusal as convincing and conclusive.

As this matter is of the highest moment, we present a few sentences to show how completely the Court understood the flimsy fiction to which they made oath. "It is palpable that the witnesses Despau and Caillavet swear to a plausible tale of fiction, leaving out the circumstances of gross reality. These originated, beyond question, in profligacy of a highly dangerous and criminal character—that of a wife having committed adultery and been delivered of an illegitimate child in the absence of her husband," etc. * * * "We cannot shut our eyes on the truth, and accord our belief to this *fiction*."

This is found in the reasoning, on pages 527 and 528. But read the first result of the conclusions of the Court, as follows:

1st. That the complainant's two principal witnesses, Mme. Despau and Mme. Caillavet, *are not worthy of credit.*" 12 Howard, p. 539.

Yet in the Hennen case, upon precisely the same testimony, so far as related to the credibility of these two witnesses, their testimony is reviewed and *relied upon* as establishing the marriage. We invite attention to the other testimony relied upon in the decision in 24 Howard. It will be found stated at page 600. Besides Mesdames Despau and Caillavet, we are told that the marriage was proved by "the cotemporaneous facts," as well as by the testimony of Cavillier, Bellechasse, Boisfontaine, and Mrs. Smyth.

Let us see what is fairly the substance of the testimony of these witnesses.

Bellechasse says, "I cannot swear that Clark was married to Miss Carrière." * * *

He does not swear that either of them told him so. Probate R. p. 160.

Boisfontaine says: "The mother of Myra Clark was a lady of the Carriere family; not being present at any marriage, I can only declare it my *belief* that Mr. Clark was her husband." Speaking of her marriage with Dr. Gardette, the witness adds: "Sometime afterwards, Mr. Clark lamented to me that this barrier to making his marriage public, had been created."

Mrs. Smyth says: "I do not know whether Mr. Daniel Clark was ever married, or not." R. 82, vol. 2, p. 224.

The next and last witness relied on in the Hennen decision to sustain the marriage, is Mr. Cavillier. It will be seen that he decidedly negatives the proposition, and furnishes some very cogent reasons in support of the theory declared to be the *truth* in 12 Howard, p. 532, that the intercourse between these parties was illicit and adulterous.

After stating that he was intimately acquainted with Clark almost from his first arrival in the country, the witness, Cavillier says: "I never knew him (Clark) as a married man, and

never heard of his being a married man; I always knew him as a bachelor."

Being asked what was the relationship or connection which existed between Daniel Clark and Madame De Grange, according to the public understanding or reputation? answered, "He was considered as the lover of Mrs. De Grange." * * * "He (Clark) was considered an honest man, of good reputation; it is for that very reason that I think he was never married *to that woman*, because he well knew the conduct of that woman, and was himself a man of delicacy of feeling."

R. No. 82, vol, 2, p. 367, et seq.

Mr. Cavillier, upon cross-examination by complainant's counsel, and in answer to questions pressed upon him, presents some further corroborative details, which we ask may be read from the Record, as they are too indelicate to be otherwise spread before the eye of the Court. They show conclusively there could have been *no marriage*.

Mr. Justice Wayne, when he referred to the testimony of this witness to sustain the alleged marriage, doubtless confined his attention to an isolated expression of his, that "he had *heard* De Grange was a *bigamist*, did not know, etc."

Mr. Cavillier was a well known merchant in New Orleans, the head of a large and respectable family connexion, and certainly if reliance can be placed in his statements, Clark not only did not, but could not have married Madam de Grange.

We will now ask attention to the evidence produced by the defendants which completely refutes the proposition of Clark's marriage.

He was never married to Zulieme or any body else. He was

a gay bachelor and had numerous sweet-hearts and *mistresses*, but no wife----never.

When this case was at issue, in 1849, a mass of testimony was taken upon the question of Clark's marriage, which is now before this Court as evidence, but which seems not to have been brought to the attention of Your Honors when the Hennen case was tried and decided. We refer now more particularly to the testimony of a large number of highly respectable citizens of New Orleans, both ladies and gentlemen, who were the intimate personal associates of Daniel Clark, who were questioned upon the point now under consideration, and as the population of the place was then very small, comparatively, and Clark well known to the public, these witnesses were not likely to have been misinformed or mistaken.

We now invite attention to their statements:

It will be seen that, with the best facilities for obtaining correct information of the fact, none of them possessed any knowledge of Clark's alleged marriage.

We will give a few extracts from some of these numerous depositions:

J. Courcelle says: "Daniel Clark was never married, so far as I know. I have said that Daniel Clark was never married, because the population was so small that we knew everything that took place." R. No. 82, vol. 2, p. 397.

Mr. Charles Harrod: "I have always heard him (Clark) speak of himself as a bachelor, and we frequently joked with him about a lady in Baltimore, whom we supposed he was going to marry. Frequently, when dining together, we conversed on such subjects, and the course of conversation was that of bachelors; it led me always to believe he was a bachelor. I think he was considered a bachelor by the community of New Orleans." R. 82, vol. 2, p. 403.

E. Carraby swears that "Clark and Madame Des Grange lived together in an *amorous and illicit connection*. And witness understands by this that he lived with her as her lover. This was the *general report*." And again: "Mr. Clark was a

too high-minded man to contract marriage with his paramour." R 82, vol. 2, p. 378.

P. J. Tricou says: "She (Madame Des Grange) was considered as the *mistress* (amante) of Daniel Clark." Ib. p. 379.

Jean B. Dejan swears that he "was well acquainted with Clark from 1797 up to the time of his death in 1813. He was a single man; never heard from any person, up to the time of his death, that he was a married man." Ib. vol. 2, p. 400.

Jean Canon: "Knew Clark intimately. Clark never told me he was married. I always forbore questioning him about Madame Desgrange, as I knew that Clark had an intrigue with her." Ib. vol. 2, p. 387.

For brevity sake, we can only refer to the corroborative testimony of the following witnesses on this point:

H. J. Domingo, R. 82, vol. 2, p. 401.
L. Le Sassier, " " 362.
A. Cruzat, " " 496.
W. Miller, Probate R. pp. 175–9.

Wm. E. Hulings, R. 82, vol. 2, p. 588, says: "I firmly believe Clark was never married."

Mrs. Hulings was an intimate acquaintance. Says "it was as perfectly understood that Mr. Clark was an unmarried man as that Relf and Chew were married men." Ib. vol. 2, pp. 531–2.

Barbarin de Bellevue proves that Clark was engaged to her sister at the time of his death. Ib. vol. 2, p. 363.

That he was not married, and that he addressed Miss Chew in 1810 with a view to marriage, is proved by:

Mrs. Julia A. C. Wood, R. No. 82, vol. 2, p. 521.
Mrs. C. M. Stannard, " " 523.
Mrs. Anna M. Callender, " " 525.

Mr. Justice Wayne seems to have relied, for proof of this marriage, on *Clark's declarations* to that effect.

See opinion, 24 Howard, p. 600.

To whom were these declarations made? His most intimate

friends never heard him make any such declarations. Bellechasse does not say so. Who was more intimate with Clark than S. B. Davis and de la Croix? Neither of them ever heard him say so.

The former was the complainant's foster-father, and the latter her chosen tutor. What do they affirm on this subject?

Davis says: "I have no personal knowledge as to whether Mr. Clark was ever married, it never was the subject of conversation between us that I have any recollection of."

R. 82, vol. 2, p. 987.

Mr. Davis was complainant's witness at one time, and when testifying in Court, felt reluctant, no doubt, to expose her if he could honorably avoid doing so.

But Mr. Peter A. Browne, who was intimate with Davis, in Philadelphia, swears that Davis told him (Browne) "that the question had not been put to him in such a direct manner as to elicit an answer; but added that he (*Clark*) was no more married to her (Zulieme) than he (Davis) was,"

See testimony of P. A. Browne, R. 82, p. 896.

Hear now what de laCroix says of a conversation with Clark, *only a few months before the death of the latter*, "Mr. Clark, several months before his death, came on my plantation and asked my consent also to become the tutor of the said child Myra, and told me that his intention was to leave her a fortune sufficient *to efface, if possible, the dishonor of her birth*," and again, "my private opinion is that Mr. Clark was *never married*, and I am the more confident in entertaining this opinion, as Mr. Clark, with whom I was very intimate, would not have concealed this circumstance from me, when he had the before-mentioned conversation with me on my plantation, and he would not then have called his daughter *a natural child*."

R. No. 82, vol. 2, p. 768.

7. Daniel W. Coxe, who was the partner of Clark, after stating his belief that Clark was never married, says: "I do

not believe it possible that Daniel Clark, standing in the business and personal relationship of unlimited and cordial confidence which he did to me, could have been married in the city of Philadelphia or anywhere else where I was, without informing me of it, or inviting me to the wedding."

He adds: "*Daniel Clark did both write and speak* to me about his (the said Clark's) relationship *or connection* with Madame De Grange, the reputed mother of the complainant Myra. In the early part of the year 1802, the said Madame De Grange presented herself to me, with a letter from Daniel Clark, introducing her to me, and informing me in confidence that the bearer of that letter, Madame De Grange, *was pregnant* with a child by him, and requesting me, as his friend, to make suitable provision for her," etc. R. 82, v. 2, p. 417.

Such an incident was not calculated to impress the mind of Mr. Coxe with the idea that the performance of a marriage ceremony between these parties was either probable or necessary *afterwards*.

Six years later, the complainant's mother again met Mr. Coxe in Philadelphia, just before her marriage with Dr. Gardette, and told him "she had heard that Mr. Clark was going to be married to Miss Caton, of Baltimore, which she complained was a violation of *his promise* to marry her."

R. No. 82, v. 2, p. 789.

She did not pretend then that Clark had married her; but only that Clark *had promised to* marry her.

8. The complainant, in her former bills, has uniformly represented that this marriage took place in the latter part of 1802, or in 1803, in the city of Philadelphia.

Now, the fact is clearly proved that Clark was not in Philadelphia at that time. Mr. Coxe, who resided there, says positively, "Clark was not in Philadelphia at any time during the year 1803." R. 82, vol. 2, p. 416.

Clark left New York prior to the middle of August, 1802, for Europe, (vol. 2, p. 415,) sailed directly from Europe to

New Orleans and arrived at the latter place in the beginning of 1803, as he himself says in his letter, (R. 82, vol. 2, p. 431.) These facts are shown conclusively by the testimony of Coxe, (R. 82, vol. 2, p. 415,) and the correspondence of Clark, annexed thereto.

9. In all of the public and notarial acts signed by Daniel Clark, he represents himself as a single man.

10. All of Clark's relations regarded him as unmarried.

See letter of his sister, Jane Green, R. 82, vol. 2, p. 583.

He died, leaving his mother under the conviction that he had no legitimate children, but that Caroline and Myra were his illegitimate or natural children; and Mrs. Clark so describes them in her last will. Can this Court believe it possible that a man of the proud bearing and chivalric temperament which the proof attributes to Clark, whose devotion to his mother is expressed in his letters, (R. 82, vol. 2, pp. 491, 492, et. al.,) that such a son would not, if possible before he died, have disabused his mother's mind of the impression that his children were illegitimate?

The mother of Daniel Clark is shown by her letters in the record, addressed to him, to have been an intelligent old lady; and it is not likely that she failed to inquire and learn the true *status* of her grandchildren from the ordinary source, to-wit: their own father, and it is beyond the pale of human credence to assert or believe that Mary Clark, the grandmother of the complainant, would have branded the child of her son, as illegitimate, if that son had represented her to his mother as legitimate. Her own honor, and the good name of her family; in short, every interest by which she could have been influenced, prompted her to believe and represent the complainant as legitimate; yet, in the face of these acknowledged sympathies of the heart, we find in the solemn act of her last will, these words: "I do give, devise and bequeath to my granddaughter, Mira Clark, commonly called Mira Davis, *another*

natural daughter of my late son, Daniel Clark," etc., R. 82, vol. 2, p. 536.

11. That Clark was not married is further shown by the fact of his addressing Miss Caton of Baltimore, in 1807–8.

This is fully proved by the testimony of D. W. Coxe. R. 82, vol. 2, p. 417; and by Clark's letters to Coxe, dated at Washington, Jan. 12 and Feb. 9 and 14, 1808.

We give a conclusive extract from one of these letters:

Clark writes: "I shall set off this evening for Annapolis, and shall pass two or three days there. If I find Miss Louisa Caton as favorably inclined toward me as you have hinted, *I shall endeavor so to secure her affections as to permit me to offer myself to her.*"

R. No. 82, vol. 2, p. 939 and 940.

12. That there was no marriage is proved also by the fact sworn to by S. B. Davis, that CLARK NEVER WOULD, *to his knowledge*, MAKE ANY PUBLIC FORMAL ACKNOWLEDGMENT OF HER BEING HIS CHILD, NOR GIVE HER HIS NAME.

R. No. 82, vol. 2, p. 988.

In a document annexed by Mr. S. B. Davis, to his deposition as a part of his testimony, he states: "When about to leave Louisiana for this State (this was in 1812) I told her (the complainant's) father, that we could not consent to part with her until he *publicly claimed her as his child, and give her his name. This he (Clark) never did.* * * * She was ignorant of her parentage, and bore a name not her own, solely because her own parent desired it should be so. He could at any moment have communicated the truth to her, or he could at once have made it known to the world by taking her under his protection, or giving some other public and notorious evidence of it. *The duty of so doing, I urged upon him during my residence in New Orleans,* and especially when I was about leaving there in such terms, indeed, as occasioned

considerable excitement in his feelings, with a declaration that he would take her from me. As I have stated, I refused to part with her, except on the condition of *such an acknowledgment. To this he would not assent* and his child accompanied me.

See R. No. 82, vol. 2, p. 1043.

13. Why is it that in the voluminous correspondence of Clark, not one word is said of "his legitimate and only daughter," the complainant? There are a hundred of his letters in the record, and a hundred more brought up in original. In very many of these letters he speaks in terms of endearment of his mother and sisters, provides for their wants, and expresses the heartfelt anguish he endured when his straightened circumstances compelled him to ask others to provide for their necessities—but not one word is said, not even the faintest reference made to his *legitimate and only daughter*. Upon this subject, his letters are as silent as his grave. Is this natural? Would this have been so had he been indeed, *or in his own opinion* ever, the lawful husband of the complainant's mother.

14. Why, when the marriage took place in Philadelphia, in August, 1808, between the complainant's mother, under the name of Mary Zulima Carriere, (not Mrs. Clark) and Dr. Gardette, (see R. 82, vol. 2, p. 432) did not Clark object.

Would he not have objected if he had even supposed himself her husband? He, the proud Congressman, the defiant enemy, whose sense of wounded honor could be appeased only by the blood of his foe on the field.

See account of his duel in June, 1807, with Gov. Claiborne, R. No. 82, vol. 2, p. 460.

Could such a man tamely submit to the sacrifice of his marital rights—allow his wife to cast aside his name and marry another without objection on his part? Instead of acting as an

outraged husband would have done, we find him at that precise period, endeavoring to secure the hand of Miss Louisa Caton.

Thrice happy spouses to be able thus to contract and dissolve at your own pleasure those bands which most mortals find so lasting, and the law so slow to unloose.

See 1 Partida, title 6, law 58.

If Your Honors will read attentively the circumstances attending the birth of the complainant, and her sister Caroline, as detailed by Davis, Boisfontaine and others, you will find all the circumstances of union without marriage, so that a few years later, when these parties appear, the one in real marriage with Dr. Gardette and the other attempting marriage with Miss Caton, it is self-evident that neither had any idea that they were already married.

15. We conclude the review of Clark's conduct on this branch of the case, by presenting the most irrefutable proof, from his own pen, that he was not married. It is in a letter addressed to his sister, written in 1805, which does not appear to have been called to the attention of the Court when the Hennen case was decided. It is of such importance as to challenge remark even in an adverse decision, as that was.

We give it in full:

"NEW ORLEANS, 14 October, 1805.

My Dear Sister:

I have received your letter of the 3d May, and thank you kindly for the pains you took in filling the toilette. I assure you that it would have given me infinite pleasure to have offered it either *to Mrs. Clark, or any person likely to become Mrs. Clark; but this will not be the case for some time to come, for as long as I have the misfortune to be hampered with business, so long will I* REMAIN SINGLE, *for fear of misfortune or accident.* DANIEL CLARK."

See R. No. 82, v. 2, p. 526.

By stipulation, in the Record, at page 386 of vol. 2, it was agreed that this letter be *admitted and read as evidence* provided Mr. Barnes should swear that he had seen the original.

This Mr. Barnes did.

See his testimony at p. 528 of vol. 2, R. 82.

Now here is conclusive proof *admitted to have emanated* from the pen of Clark himself in October, 1805, writing to his sister, (her letter, to which this is an answer, will be found in same Record, at page 583, vol. 2,) in which he could have no motive to deceive. We respectfully submit that this recorded statement of Clark himself, that he was single, admitted and proved to be genuine, cuts off further room for doubt, if any existed.

The memories of the witnesses who have testified might be mistaken as to what they heard him say, but in this letter we have his own words, about which no uncertainty can exist. He therefore *certainly* was not a married man, Oct. 14, 1805, and complainant says she was born in June, 1806!! What becomes of the alleged marriage in 1803, in the light of *truth* revealed by this letter from Clark's own hand?

16. Let us pause an instant and consider the question of the complainant's legitimacy in the light of the conduct of Daniel Clark, as exhibited in the testimony we have now reviewed.

The spring of 1806 is the date given, by complainant, of her birth—the precise date of the election of Mr. Clark as the Representative of the then Territory of Orleans, in Congress. The population of New Orleans numbered then only a fraction over 8000 persons of all classes.

See Martin's History of La., p. 205.

And, so far as we know, Clark was the most noted or distinguished man of the city, as well as the most popular. He is certainly proved to have been a chivalrous gentleman, with a very keen sense of personal honor, and exceedingly fond of female society. With these facts upon the memory, pass in review

the circumstances proved. Again, let us take up the testimony of Boisfontaine and S. B. Davis, the complainant's witnesses and protectors in her infancy, and read the circumstances of her birth.

These are the incidents which Clark knew, gave the child a *status* in society. When the complainant was born, Clark is not described as married to Mrs. Des Grange and keeping house, as other men do. On the contrary, he applies to Davis, as Davis testifies, "to procure a place in which *a female* about to be confined with a child, of which he said he was the father, could be accommodated. I procured a situation for *the female*, the Mrs. Des Grange of whom I have spoken, at the house of Baron Boisfontaine," etc. See testimony of Davis, R. 82, vol. 2, p. 987.

If Clark had represented the complainant's mother then, or at any other time, to Davis as his wife, would Davis have dared to call her "*this female?*" He had no motive to say she was not "Mrs. Clark," if Clark had told him so. Remember the interest of this witness was to make the complainant legitimate if possible. How does it comport with the character drawn by all the witnesses of Clark, to find him thus engaged hunting up "a place" for the *accouchment of "this female?"* Very shortly after the birth, S. B. Davis took the child, gave her *his name*, and the mother disappeared. An almost precise repetition of what occurred in Philadelphia, according to the testimony of D. W. Coxe, where the complainant's sister, Caroline was born. All the circumstances attending the complainant's birth, as well as the conduct of Clark before, at the time, and afterwards, are perfectly irreconcilable with his admitted character and circumstances, or with the theory that Clark and Zulieme were married; and, on the contrary, they are easily enough understood upon the theory that the intercourse of these parties was illicit—made so and kept so, as this Honorable Court expressed the fact, referring to Des Grange's persecution, so that Des Grange's "wife might indulge herself

in the society of Clark, unencumbered and unannoyed by the presence of an humble and deserted husband." See 12 Howard, p. 532.

17. The conduct of the complainant's mother remains now to be specially considered, so far as it tends to throw light upon the question of the alleged marriage.

1. The complainant does not deny that her mother was lawfully married, Dec. 4th, 1794, to Jerome Des Grange.

2. On the 7th September, 1802, Zulieme testified before the ecclesiastical Court in New Orleans, when her husband was tried for bigamy, that "the reports on that subject had caused her no uneasiness, as *she was satisfied the reports were not true.*"

See Ecclesiastical Record, R. 82, vol. 2, p. 515.

3. About the year 1802, (it was really 1801, as shown by her testimony before the Ecclesiastical Court,) she went to Philadelphia with a letter from Daniel Clerk, to Daniel W. Coxe, as heretofore stated, when she was pregnant and delivered of Caroline.

By delivering such a letter, Zulieme impliedly admitted the truth of its statements. See 12 Howard, p. 525.

4. On the 30th Nov., 1805, she sued Jerome Des Grange as *her husband*, and as his wife petitioned the Court to condemn him to pay her alimony for her support, at the rate of $500 per annum.

See Record suit of Des Grange v. Des Grange, R. 82, vol. 2, p. 554.

5. In 1806 she brought a suit in the "County Court" against her husband, De Grange. But the most diligent search was ineffectually made for the petition. It was reviewed by this Court in 1851, with this conclusion, that it was a mutilated Record and "proved nothing."

12 Howard, p. 536.

6. In 1808 she went to Philadelphia, when on the 2d of August, she was married to Jas. Gardette as Mary Zulima Carriere, and not as Mrs. Daniel Clark, as would most likely have been the case had she ever borne the name of Mrs. Clark.

See certificate R. 82, vol. 2, p. 432.

It is somewhat remarkable, too, that she should have married Gardette in 1808, when she was "lawfully married" to Clark in 1803, with no evidence whatever in the Record of *a divorce* in the interval.

7. In 1808 just before her marriage with Gardette, she sent for Mr. Coxe in Philadelphia, and during a private interview at Mrs. Rowan's boarding house, Mr. Coxe tells us "she stated that she had heard Mr. Clark was going to be married to Miss Caton of Baltimore, which she said was a violation of his PROMISE TO MARRY HER, and added, that she now considered herself at liberty to connect herself in marriage with another person, etc."

See testimony of Coxe, R. 82, vol. 2, p. 421.

We here have it from her own lips, that Clark had only *promised* to marry her.

The complainant has exhibited a commendable, but unavailing activity to show that her mother was divorced from De Grange, thus endeavoring to establish that there was no legal impediment to the alleged marriage with Clark in 1803. This is not surprising, as an impediment in that direction might involve the complainant's title to Clark's (supposed to be) rich (but really insolvent) estate.

Is it not strange that not one particle of proof has been offered in this voluminous Record to show that the complainant's mother was legally divorced from Clark before she married Dr. Gardette?

This discrepancy is the more remarkable when we consider the *theory* of the complainant that the marriage between

Zulieme and Clark took place in 1803, and the complainant's birth in 1806. In the little interval then of about two years after the birth of this "*legitimate* and *only* child," her mother contracts the marriage with Gardette.

9. If Zulieme had really been the wife of Clark, would she not have taken his name, would she not have resided with him *at some time*, and would she not subsequently, have advised her daughter Myra of her parentage, in time to have prevented those voracious executors from devouring the "princely" estate of the father? Would she not as Clark's widow in community have compelled Clark to support her, and when he abandoned her, would she not most probably have used the process of the Courts and have sued him for support and alimony, as she did the elder husband, Des Grange.

A woman who has had experience with one worthless husband, refusing to support her, and has successfully coerced him to a sense of duty to her, by resort to law, would not be likely to let the second deserter escape the same corrective process. Still, if she had concluded to sacrifice her own interests and feelings, would not maternal affection have prompted her to communicate to her daughter Myra, the all important information, (if such had been the fact) that she was really Clark's wife, and Myra the only and legitimate child of that marriage, for the protection of the interests and *reputation* of the child. When the facts proven are remembered, and the theory of the complainant in regard to this marriage is tested by the rules and results which would ordinarily obtain, among other families similarly situated, this pretended marriage of Clark and Zulieme, is rendered not only improbable, but impossible.

Zulieme knew that her daughter was living with the family of Mr. Davis and bore *his* name. This, of itself, was a reflection upon the legitimacy of her child and of her own connection with Clark, which it is not for a moment to be supposed she would have submitted to, had she supposed herself his wife. Then when he died, had she supposed that Myra was indeed

Clark's legitimate child, would she not have communicated that fact to her friends, and recovered his estate, whatever it was, for the benefit of the child?

The fact that Clark and Zulieme were not married, and that the complainant was the illegitimate issue of their illicit intercourse, is shown also by the conduct of her *foster*-father, S. B. Davis, and her *foster*-brother, Horatio Davis.

The defendants have produced in evidence, from the Probate Court of New Orleans, the record of a suit brought 24th June, 1817, entitled "Myra Clark and her curator *ad litem*, S. B. Davis vs. B. Chew and R. Relf, executors of Daniel Clark, deceased.

The petition sets forth that Myra Clark, 13 years of age, is the *natural daughter* of Daniel Clark, and entitled to "*alimony*," from his estate. It further states that the petitioner had heard that some instrument was executed by her said father making some provision for her, and concluded with a prayer that the executors produce all papers relating to her, etc.

We invite attention to the petition and answer of the executors, Chew and Relf, in this *alimony* record.

They will be found at p. 51–54 of vol. 2, R. 82.

In 1817 then, only four years after the death of Daniel Clark, the complainant's *first suit* was brought, as Clark's *natural* child, for *alimony*.

It seems that in a statement published in 1835 Mr. S. B. Davis denied having authorized the bringing of this suit, or the statements made in the petition. But that he did so, and that his memory was at fault is proved, *first*, by his answer to the 66th cross-interrogatory, vol. 2, p. 998, R. 82, and by the testimony of his son, Horatio Davis, Esq., of the firm of Davis & Pierce, who brought the suit, as the following extracts from a letter dated in 1841, attached to and made part of the deposition of that gentleman will show.

After stating that he had written and presented the two petitions claiming alimony for Myra, he adds: "It is true that I

made the application in behalf of my father, that I did so by his direction ; he furnished me with the grounds for the application." * * * "After a lapse of twenty years, that he should have forgotten the part he took in the transaction is not so remarkable, etc." * * * "The bringing of the suit was the consequence of his conversation with Mr. Livingston, who was to have given me his assistance in conducting it. After the conversation with Mr. Relf, by direction of my father, I moved for its discontinuance."

Testimony of Horatio Davis, R. 82, vol. 2, pp. 383, 384.

Horatio Davis was the foster-brother of the complainant and raised with her, and, besides the authority from his father for bringing this alimony suit, he had positive knowledge of the complainant's status, which is thus stated by him in the letter quoted from above, which was addressed by him to the complainant, he says: "You (the complainant) have alleged, and by the testimony of your aunt, Mrs. Despau, now on record, have endeavored to prove, that Daniel Clark was married in Philadelphia in the year 1803, to Mrs. Des Grange, your mother, and you take offence, and accuse me, because you were styled in the petition, a natural daughter of Daniel Clark." * * * From your infancy I had never heard you designated otherwise. I believed you to be his natural daughter, and so named you in the petition, to establish your title to alimony, etc."

Testimony of H. Davis, vol. 2, p. 384, R. 82.

Next to Clark himself, no one could have been more intimately acquainted with the true *status* of the complainant, than S. B. Davis, and certainly none was more interested in securing her rights if she had any as Clark's heir.

He raised her from infancy to her marriage day, as his child, bearing his name, and, as he informs us, paid all her expenses; Clark not contributing anything to her support or maintenance.

R. 82, vol. 2, p. 1043.

Why then did he never try to obtain more than a mere alimony for her from Clark's estate?

His answer, on cross-examination, shows that it was because of the complainant's illegitimacy and the insolvency of Clark's estate. Besides, he says, he was never urged by the mother or other relatives of Myra to claim the estate for her.

See testimony of Davis, vol. 2, p. 287, R. 82.

His testimony shows that he was warmly attached to the complainant, and when he visited New Orleans, in 1817, consulted able lawyers, among whom was Edward Livingston, Esq., a jurist of very high repute, as to his duty and the complainant's rights; the result was the suit for *alimony*.

How is the complainant's case improved, if this record is left out of view entirely? Then the great fact remains that her foster-father, mother and relations did *nothing* to vindicate her supposed rights. The case stands worse than before. The rules which ordinarily influence human conduct, are not to be ignored by Courts in their decisions. If Clark's estate had been solvent, and Myra his legitimate child, her friends and relatives were themselves too deeply interested to have remained silent and done nothing. Their conduct shows that they knew, and doubtless from Clark himself, what Clark had but a few months before his death told de la Croix, that Myra was his natural child, and he wished to efface the dishonor of her birth, etc., etc.

R. 82, vol. 2, p. 768.

XV.—The illegitimacy of the complainant, further appears from the fact that Clark made ample provision for her as his natural daughter, and she has received all he thus left for her, except $2,360, left with S. B. Davis, for which the latter gave Clark his note, which being found among the assets of the succession, Davis had to repay it to the executors. Probate R. p. 171.

Clark learned from his attorney, Mr. Mazureau, that his daughter, Mira, was of such a class of bastards as not to be capable, by our laws, of receiving by will from her supposed father, anything beyond what, might be necessary for her sustenance and education, * * * and that she could not be legitimated," etc. In answer to his question, "What shall I do, then?" Mr. Mazureau replied: "Sir, if you have friends in whom you can place your confidence—you probably have some—convey them secretly some of your property, or give them money for the use of the child, to be given to her by them when she becomes of age." Clark replied, "That I'll do."

See Mazureau's letter, R. 82, vol. 2, p. 432.

It is abundantly proven that he followed this advice of his counsel, and placed in the keeping of De la Croix, Bellechasse and Davis, certain real estate and money, which, of right, belonged to his creditors, as he was insolvent. That these parties faithfully discharged their trust, and conveyed to the complainant the property thus clandestinely left with them for her.

Let us read the proof:

De la Croix says, in his deposition taken 28th September, 1835: "I remember that Mr. Clark, some years before his death, transferred to me some property, with the verbal request that I should put his *natural daughter Myra* in possession of it after his death, which I accordingly did, some years since, by a public act at New Orleans." R. No. 82, vol. 2, p. 768.

These lots had been put by Clark in Davis's name in 1807 or 1808, for Myra's benefit. (See R. No. 82, vol. 2. p. 988.) The date of this and other conveyances disproves the theory that Clark made these assignments only in 1811 on the eve of making a sea voyage to Philadelphia.

Bellechasse testifies, he "knows that Clark, some years before his death, and particularly in the year 1811, made provision for his daughter Myra," and "that in proof of the provision, at least in part spoken of in the last answer, said Daniel Clark transferred to him several (51) lots of ground in the suburb, or faubourg, St. John, near the bayou of that name,

within the limits of the city of New Orleans, with or under the *confidential understanding* that they were to be and remain under his control or disposition for the use and benefit of said Myra, and, since the death of said Clark, he has duly conveyed to her the said lots,"

R. No. 82, v. 2, p. 742.

The act of sale of this property, from Clark to Bellechasse, was passed before Pedescloux, notary, May 16, 1811.

Ib. p. 1048.

Bellechasse says, "Clark never wished to receive any written acknowledgment of the confidential nature of said sale."

P. R. p. 157.

On the 9th April, 1833, Bellechasse reconveyed this property, containing 51 lots of ground, to Myra Clark, then Mrs. Whitney.

R. 82, v. 2, p. 545.

S. B. Davis, who was selected by Clark to be the foster-father of the complainant, had property placed with him in trust for Myra, at various times. At one time Clark left with him a trunk (which was afterwards returned to him), full of valuable papers and property, for Myra *and Caroline*. R. No. 82, vol. 2, p. 988.

The letter of Bellechasse of 23d Oct., 1822, (R. No. 82, vol. 2, p. 1078) proves that Clark intended Caroline and Myra should share equally.

The same fact is proved by Mr. Coxe, R. No. 82, vol. 2, p. 788.

What father, who was wealthy as the complainant represents Clark to have been, ever before made provision for his "legitimate and only child" in a manner so clandestine?

We have thus, at considerable length, examined all the ma-

terial testimony in the record on the subject of the alleged marriage between Daniel Clark and the complainant's mother; because, in the opinion of Mr. Justice Wayne, repeatedly reiterated in the decision rendered in 24 Howard, the complainant's case, as now presented, rests upon the fact of this marriage being proved. Without the marriage it is certainly then conceded the complainant has no case; because, without the marriage, she would not be Clark's *legitimate* and only child; on the contrary, without the proof of this marriage, her *status* is of that proscribed class rendered incapable of inheriting, under the express statutes of Louisiana.

XVI.—It has been said in argument, that all inquiries into the *status* of the complainant were scandalous and impertinent. That the defendants did not occupy the position to give them the right to call her a bastard. To this we reply, we will not open our lips on the subject of your *status* if you will withdraw your hands from our property. When attacked, we have a right to protect our titles by all legal defences, and your incapacity resulting from your *status*, is one of them. And so the Supreme Court of Louisiana decided in 4 La. 178, and also in the case of *Provost* vs. *Provost*, 13 An. 574. We can use all the defences which could have been used by our vendors. Undoubtedly Mary Clark, either as heir at law or devisee holding under the will of 1811, would be allowed to maintain her rights as such by proving that the second testament was an attempted evasion of a prohibitory statute, and was null because of incapacity in the complainant to take, from bastardy, or from receiving as instituted heir, in consequence of her illegitimacy.

What Mary Clark could do, the defendants, as her vendees succeeding to her rights, can do to protect their titles.

This was so expressly decided by the Supreme Court of Louisiana, in the case of *Jung* vs. *Doriocourt*, 4 La. p. 178.

See also case of *Robinett* vs. *Verdum*, 14 La. 542.

The Courts will not countenance these sham evasions of a prohibitory statute, and favor such heirs to the injury of innocent purchasers.

XVII.—*The Ecclesiastical Record*, which was received as evidence by this Court in the case reported in 12 Howard, seems to have been rejected or disregarded in the Hennen case. It is the record of a trial had, before the highest ecclesiastical tribunal in New Orleans in 1802, of Jerome Des Grange, for the alleged crime of bigamy. The result of the trial as shown by the Record, was to sustain his innocence of the charge. This important document was produced by the Right Rev. Anthony Blanc, Archbishop of the Roman Catholic Church, from its proper place, among the archives of the Bishopric in the Cathedral in New Orleans, where it had been regularly kept.

See R. 82, vol. 2, p. 494.

And this Court will be surprised to learn, that the testimony of this high officer of the Church, although taken *twice*, and is admitted to be of great weight in determining the value of this Record as testimony, *was not brought to the notice of the Court in the Hennen case*, and from the opinion itself, appears not to have been considered at all. If it had been, this Court would never have disregarded the Ecclesiastical Record as evidence.

It is objected that this tribunal had no jurisdiction or authority to try parties accused of the crime of bigamy, and hence that the decree is valueless. The complainant, in support of this *theory*, relies upon the *opinion* of Judge James Foulhouse, a *lawyer* who informs us "that he studied with the view of becoming a clergyman." He, however, on cross-examination, reveals the fact that instead of becoming a priest, he practiced law for a living, and *had not studied theology at all in Louisiana*.

See testimony of Foulhouse, R. No. 82, v. 1, p. 200.

On the other hand, we produced the Venerable Arch-Bishop of the Roman Catholic Church for the State of Louisiana, who

affirmed that the said record was properly in his custody, as Archbishop, that they were a complete record of the whole proceedings, that Thomas Hassett was the first Canon and Vicar General representing the Bishop of the Diocese, that the See was vacant by the transfer of the Bishop to the Archipiscopal See of Guatamala and that Hassett thus became administrator.

The Bishop is sustained in most of his statements by the history of that period.

See Judge Martin's History of Louisiana, page 212. Ib. p. 122.

As to the question of jurisdiction, he could not state that the tribunal over which Hassett presided, possessed *exclusive* jurisdiction.

See testimony of Arch-Bishop Blanc, taken in 1849. R. No. 82, v. 2, p. 494.

On the trial in 1857, the complainant produced the Arch-Bishop *as her witness*, and his testimony was taken a second time. It is much more full, and is therefore more important. We suppose it was thought that, because in his first deposition he stated that he was unable to affirm as to the *exclusive* jurisdiction of the tribunal in question, he might possibly, after the interval between 1849 and 1857, have become so profoundly versed in ecclesiastical law as to find out that the Court in question had no jurisdiction at all, and thus concur with Judge Foulhouse. If such was the expectation, great indeed must have been the disappointment when, in answer to the question by the complainant's counsel, "whether the Vicar General, mentioned in the Record 141, had authority to entertain jurisdiction of bigamy," etc., the Archbishop replied, "At the time referred to in this Record, there was an Ecclesiastical Court (as there was in every place where the Spanish authority prevailed) over which the Bishop or, in his absence, the ecclesiastical officer appointed by him, presided.

This Court had jurisdiction over the marriage state, and I believe *was competent to pass upon or determine the crime of bigamy.*"

See testimony of Archbishop Blanc, R. No. 82, vol. 1, p. 196.

Your Honors will not now be surprised to find that, after this ecclesiastical record had been received and acted upon by this Court, in the case reported in 12 Howard, it was rejected in the Hennen case. The important testimony of Archbishop Blanc was not brought to the attention of the Court, and passed without consideration.

The record shows that in the Circuit Court the complainant's counsel attempted to withdraw the testimony of Archbishop Blanc, after the trial of the cause had progressed for three days, but objection was made by defendants' counsel in writing, on the ground that "after evidence had been offered before the commissioners by one party, and had become the basis of other testimony, of examination and cross-examination, etc., it could not be withdrawn by either party after the actual trial of the cause had commenced."

See objections, R. No. 82, vol. 1, p. 917.

Rules 67 and 69 of this Court governing the practice in Courts of equity protect the defendants from such injustice.

Another error of fact was made in the opinion rendered in the Hennen case. It was in reference to the testimony of Judge Foulhouse, in stating that, although the defendants reserved the right to make a motion to suppress his testimony, *that was not done*. The motion to suppress his testimony was made.

See R. 82, vol. 1, p. 915.

We have elsewhere shown why, if received at all, Judge Foulhouse's opinions should have but little weight on the subject of this record. Yet, in the Hennen case, great importance was given to his *opinion*, and the testimony of Arch-bishop Blanc entirely overlooked.

See 24 Howard, p. 589.

We refer Your Honors to the abundant and sufficient reasons

for receiving in evidence the ecclesiastical record, so clearly stated by this Court in the decision rendered in 12 Howard, pp. 522 to 525. It was then pronounced competent testimony.

Without any additional light or proof in the Hennen case, it was rejected.

See 24 Howard, pp. 580–590.

It was received by a very full and almost unanimous Court in 1852—two of the Justices only dissenting. An examination of the *reasons* subsequently given in the Hennen case for its rejection, show the gravest errors of *fact*.

For instance. It is said that the decree of Hassett places the execution of it, and the imprisonment of De Grange, upon an order of his Excellency the Alcalde, which *should have been produced with the other proceedings*, and then adds: "without that being done, no part of it can be received in evidence as the record of an authentic judicial tribunal." * * * "*The paper signed by Franco Caisergues is insufficient for that purpose.*" Here is the error:

This paper, is the identical *order* which gives validity and effect to the whole proceeding. Hassett, under his ecclesiastical authority, drew up the initiatory proceeding in the shape of a decree, which, on its face, stated that it was to be executed "*with the aid of one of the Alcaldes*," to whom it was immediately submitted, and his order given upon it, without which, the proceedings would perhaps have been illegal. Immediately under the decree we read as follows:

"In the same day it (the decree of Hassett) was passed to the capitular house and audience hall of D'n Fran'co, Caisergues, alcalde of this city, and in his jurisdiction, *and I notified to his worship the preceding decree*, and of which I have taken note." (Signed) FRAN'CO BERMUDEZ."

"NEW ORLEANS, Sept. 4, 1802.

"Let the request of the Governor of the Bishopric be complied with."

(Signed) FRAN'CO CAISERGUES."

Before me, (Signed) FRAN'CO BERMUDEZ."

See R. 82, vol. 2, p. 508.

Thus it is seen that these ecclesiastical proceedings by Hassett, as "Governor of the Bishopric," were sactioned by Fran'co Caisergues, the alcalde, or in other words) by the civil authority, and therefore not obnoxious to the objections made in 24 Howard, pp. 583, 588.

There is further evidence of the proof of the active participation of this civil functionary in these proceedings, as the following extract from the bill of costs at its close attests:

"Al Sr. *Don Franco Caisergues, Alcalde*, ordinario por las suyas."

R. 82, vol. 2, p. 507.

This docket of charges shows in brief the names and *capacities* of the officers, both ecclesiastical and *civil*, by whom these proceedings were conducted. That the *secular* aid was obtained in this proceeding is further evidenced from the fact that *three soldiers* were dispatched to arrest Des Grange.

See R. 82, vol. 2, p. 513.

When the document is perused as a whole, it is manifest that the civil authority, the Alcalde authorized and assisted the highest ecclesiastical office in this investigation, and hence, that it is not in conflict with the ordinances of Spain, of September, 1530, May, 1680, and 6th September, 1777, cited and relied on in the decision in 24 Howard, as determining its illegality, as those ordinances simply restrained the officers of the Church from imprisoning the accused without the "secular aid." "The ecclesiastical jurisdiction to inquire into the validity or nullity of marriages" was never taken away.

24 Howard, p. 585.

Again, it was an error to say that Hassett was not "Governor of the Bishopric" of the Province. He is not only so styled in that portion of the Record which emanates from himself, but expressly so, in the order given by the civil functionary, the

Alcalde Don Franco Caisergues, which was "Let the request *of the Governor of the Bishopric* be complied with."

R. 82, vol. 2, p. 509.

The reasons assigned in the Hennen case for rejecting the Ecclesiastical Record as evidence, will be found in 24 Howard, pp. 589–590. It will be seen that the reasons there given do not controvert in any particular, the argument made in 12 Howard, pp. 522–527, to show that it is competent evidence, and we submit our demand, to have it considered as evidence now, upon that argument.

In any contingency, the important statement in that Record of the complainant's mother must be received. She is now dead, She then swore in substance that she did not believe her husband, Des Grange, guilty of bigamy.

It was important for the complainant to get rid of this damaging declaration of her own mother, and it was attempted to do so by proving that her signature to the Record in question, was not genuine. There was no difficulty whatever in doing so by the process of "comparison of signatures," and that, too, by the very same experts who, in the same manner, supposed they had proved Clark's signature to the Articles of Partnership, was not genuine.

See test. of complainant's witness, S. Schmidt, R. 82, v. 1, page 207.

See test. of complainant's witness, John Douglas, ib. 1, page 210.

See test. of complainant's witness, J. Manouvrier, ib. 1, pages 214 and 219.

See test. of complainant's witness, John V. Childs, ib. 1, page 220.

See test. of complainant's witness, J. T. Hammond, ib. 1, page 226.

Of course, to say that Zulième's signature was a forgery, is the same as to say that her testimony and, indeed the whole

Ecclesiastical Record, was fabricated by the defendants. We cannot better express the answer to this and similar objections to this veritable document, than by quoting the words of this tribunal :

"It is earnestly insisted that the origin of this Record is recent, and that it had been fabricated for the purposes of this cause. We do not perceive any ground for entertaining such an apprehension—

1. The complainant's witnesses refer to such a proceeding.

2. The record of it was searched for by the complainant and not found; and for this reason its substantial contents, as it was supposed, were proved in the Patterson case.

3. The signatures of the officers of the Court are proved as being genuine.

4. Bishop Blanc deposes that he had charge of the records of the Bishopric, among which he found this one. If the allegation of fraud and forgery, insisted on, had any foundation, Bishop Blanc must, of necessity, be directly involved on that charge; and, furthermore, of swearing to that which he must have known to be false. This assumption is not only gratuitous but the witness is fully supported by the facts above stated; and the further fact that, neither in his cross-examination nor by any other evidence, is his integrity assailed by the complainant."

See 12 Howard, pp. 522–3.

So far from impeaching the varacity of Arch-bishop Blanc, the record shows that since the rendition of this decision, in 1852, to-wit, in 1857, the complainant produced and examined him as her own witness in this suit, and upon the subject of this very record.

See R. 82, vol. 1, pp. 195--198.

XVIII.—*Prescription.* Two principles of law have recently

been recognized and applied with great emphasis by this Court.

First. "That statutes of limitation are now regarded favorably in all Courts of Justice. That they are statutes of repose."

Second. "That the construction given to the statutes of a State by the highest judicial tribunal of such State, is regarded as a part of the statute, and is binding upon the Courts of the United States as a text."

Leffingwell vs. Warren, 2 black, 599, and numerous cases therein cited. See also the very recent case of Nichols vs. Levy, 5 Wallace, 444. Also Sumner et. al. vs. Hicks et. al., 2 Black, 532.

The statutes upon this subject are very plain in their terms, entirely free from ambiguity, and if enforced, here and now, as they would unquestionably be by the Supreme Court of Louisiana, the claims of the complainant are barred.

We will consider in their order the statutes applicable, and which we maintain, are fatal to the cases now before this Court.

1. "He who acquires an immovable in good faith, and by a just title, prescribes for it in ten years, if the real owner resides in the State; and after twenty years, if the owner resides out of the State." Such is the law of the State of Louisiana as expressed in article 3442 of the Civil Code. The same law existed under the old Code of 1808. (amended by act of 1848 § 60

The term just title does not mean a good or valid title, because then prescription would be unnecessary, and therefore a title which, on its face, is translative of property, is the just title that forms the basis of prescription; provided the possessor is in good faith.

Code of 1808, sec. 7, p. 102. 9 La. Rep., p. 141. 2 Trop., p. 459. Ib., p. 461, No, 873, sec. 9.

Good faith in the possessor is always presumed. That is the law.

See Code of 1808, p. 488, art. 71.

The just title, as well as the necessary possession of the de-

fendants, are conceded by the following admissions of record:

"It is further agreed, in regard to the proof of possession, in order to save delay and expense, that the defendants took public and unequivocal possession, under titles as owners, which was continuous and uninterrupted by each vendee, back to, but not including the sales made by Chew and Relf, etc."

The production in evidence of copies of acts of sale was dispensed with, and the sworn statements in the answers held sufficient.

See admission, R. 82, vol. 1, p. 87.

As the present suit was not brought until 1857, it is incumbent on the complainant to bring her case by proper proof within one of the established exceptions to the general rule. She presents three; *first*, her minority; *second*, her non-residence; and *third*, a legal interruption. We will consider these separately. *First.* During the period the complainant has proved her minority continued, the particular prescription now invoked in favor of the purchaser with a just title, did not run. It begun to run, only from the day of her majority. When was that? In her numerous bills she varies the date of her own birth, sometimes stating it to have occurred in the month of June, 1806, and again in December of that year. The statement of her witnesses manifest a greater uncertainty. It is only when the memory of the witnesses is aided by associating the fact with cotemporaneous events that the date can be fixed satisfactorily. This, fortunately, was done by several witnesses. For example, the complainant's witness, Bishop Philander Chase, who testifies that in the fall of 1806 she was a year and a half or two years old, recites how he visited New Orleans in the autumn of 1805, and obtained from the Legislature of Louisiana the charter of Christ Church, and after going to New York, returned to New Orleans in the fall of 1806, and resided three miles below the city in a house adjoining that occupied by Mr. Davis, when he saw the child Myra daily.

See vol. 2, p. 295.

S. B. Davis, who raised the complainant, says, "she was born in New Orleans, on the last day of June, (to the best of my knowledge,) in the year 1804, *about the time of taking possession of Louisiana.*" R. 82, vol. 2, p. 281.

Horatio Davis, son of the last named witness, says, "The infant, Myra, was brought to my father's house some time in the year 1804." * * * He then states a fact which had assisted his memory in fixing the date: "I left New Orleans in the summer of 1806, to go to the North for an education."

R. 82, vol. 2, p. 381.

Aimee Baron Boisfontaine is very clear and to the point. She says: "Myra was born in the month of June, 1804." And her husband, P. J. Baron Boisfontaine, fully corroborates this statement. See R. 82, vol. 2, pp. 949, 946.

It is therefore satisfactorily proved that the complainant was born in June, 1804, and attained her majority in June, 1825. An examination of the proof shows that no reasonable doubt can exist on this subject.

Second. It is next contended that she has twenty years from her majority, in which to bring her action, because she was a non-resident *during that period*, which is not true.

The defendants maintain that it was incumbent on her to have cited them within the shorter period of ten years. To receive the benefit of the longer period, she must allege and show she was continuously absent, and, therefore, unable to bring suit. The record shows that the complainant was present with her husband, prosecuting her legal rights by a suit in the Probate Court of New Orleans, in the month of June, 1834, in which she took much testimony, but finally abandoned it, so that she had abundant opportunity to have used the process of the Courts within the shorter period, and was in legal contemplation a resident, because this record shows she was actually present, with opportunity to vindicate her rights.

Third. The complainant next contends that the suit instituted

by her in the Probate Court of New Orleans, 18th June, 1834, operated as a legal interruption of prescription.

This is true *only as to the parties then cited* by her, and it is undeniable that not one of the present defendants were made parties to that proceeding. Her counsel does not pretend they were. Hence, it did not interrupt prescription as to them.

On the 25th July, 1836, more than ten years after she became of age, and consequently after her rights had become prescribed, the complainant filed her first bill against certain defendants, being suit No. 122 in the U. S. Circuit Court. The mere filing of the bill did not interrupt prescription. To effect this it was necessary that process should issue, and service of citation be made upon each defendant.

It is necessary, therefore, that the complainant should satisfy this Court, by due proof, that citations of her suit were made. When examined, the returns show that not one citation was made within the ten years, many after twenty years from her majority, and others—not a few—as late as the institution of the present suit.

2. But in any and every case in which the complainant is able to show an interruption of prescription by citation of her bill filed in 1836, it must be borne in mind that this suit, in which the interruption occurred, went on to trial and final decision in 1852, and, of course, at its close, operated as effectually against her as *res adjudicata*, as its citation in the beginning operated an interruption. She may choose either horn of this dilemma. They are alike fatal to her pretensions.

3. We have elsewhere shown that, in 1848, the complainant voluntarily renounced and abandoned her claim under the will of 1813, by her bill of 1848 amendatory of her original bill of 1836, and therefore the interruption "by her suit of 1836, must be considered as having never happened."

Louisiana Code of 1825, Art. 3485.

4. The prescription of ten years against a vacant estate is applicable under complainant's view of the case. She maintains that the defendant's titles are defective, for want of legal

acceptance by Mary Clark, of the estate of Daniel Clark. As there is no pretence of acceptance by any other heir, then the estate remained vacant *if Mary Clark's acceptance be invalid*, and the right to accept a vacant estate became prescribed after ten years; and this prescription against a vacant estate was not suspended on account of the minority of the heir.

Code of 1808, pp. 172, art. 118. and p. 486, art. 62.

9 La., 147, Davis Heirs *vs.* Elkins.

8 La., 321, Poultney *vs.* Cecil.

5. No legal ingenuity can relieve the complainant's case from the prescription of *thirty years*, which bars all claim to a succession, as was decided by the Supreme Court of Louisania, in the succession of Zacharie, 12 Annual Rep., p. 97. The estate of Clark was opened by his death in August, 1813, and the present suit was brought in 1857, after the lapse of *forty-four years*.

This prescription could not have been interrupted as to any of the present defendants, by her suit for the probate of the will in 1834, because, as we have shown, none of them were cited in that proceeding.

See Civil Code, Art. 3484.

It may be further observed, though really unnecessary, that she *voluntarily* suffered a nonsuit, and thus voluntarily abandoned that proceeding, and the running of prescription, if interrupted, was restored.

See R. 82, vol. 2, p. 781–2. Civil Code, Art. 3485.

It is only when the nonsuit is *involuntary* that prescription is interrupted.

10 An. 331.

This prescription was not interrupted by the complainant's suit in the U. S. Circuit Court in 1836, because, as we have shown, by her amended bill filed in 1848, she *formally abandoned her claim under the will of* 1813.

R. 82, vol. 2, p. 78. Code of 1825, Art. 3485.

The legal effect of this abandonment was, to restore the

running of prescription, precisely as if no interruption had occurred.

It would have been wiser had her eminent counsel conformed to the advice of this Court as expressed in the opinion rendered in 2d Howard's Reports, and proceeded then with the probate of the will of 1813, before proceeding further against the defendants for the property.

They would not do so. They preferred to *abandon* the claim under the will. They did so for the reasons we have given at some length under the head of *renunciation*, elsewhere in this brief. The complainant cannot now escape from the legal consequences of the *voluntary abandonment* then judicially made of her claims under the will of 1813. The language of the law is not susceptible of doubt. It is in these words, as expressed in the Code:

Art. 3484.—"A legal interruption takes place when the possessor has been *cited* to appear before a court of justice."

Art. 3485.—"If the plaintiff in this case, *after having made his demand, abandons, or discontinues it, the interruption shall be considered as having never happened.*"

No argument could make this matter plainer. This law, in the language of the decision reported in 2 Black's Rep. p. 599, and 5 Wallace, p. 444, is indeed a "statute of repose," and "is to be favorably considered in every court of justice." The defendants now invoke "the repose" thus conferred.

XIX.—*Res adjudicata.*—The decision of this Court in the cases of Mrs. Gaines v. Relf, De la Croix, and others, reported in 12 Howard, 472, is a complete bar to this action, and the defendants plead it as *res adjudicata*. Among other conclusions of the Court in that case, it is declared that the fact was established that "*Des Grange was the lawful husband of the complainant's mother, in* 1802 *or* 1803, *when the com-*

plainant alleges Daniel Clark married her mother, and that therefore complainant is not the lawful heir of Daniel Clark, and *can inherit nothing from him;* and consequently that the complainant can take no interest under her mother by the conveyance set forth in the amended bill, *she not being the widow of Daniel Clark. The question decided concludes this controversy,* nor shall we go further into it."

It was also held, that "the decree of this Court in Charles Patterson's case, (6 Howard, 550), does not affect these defendants, because *it was no earnest controversy.*" See page 539 of 12 Howard.

It would be idle to deny that each and every proposition established by this decree, is *res adjudicata* between the complainant and the same parties, or their privies; and it would be equally vain to deny that if the personal *status* of the complainant was, as we contend, the subject of that decree, then that decree is not only *res adjudicata* upon the parties to the suit, but upon rules of law established in the interest of society, the power of that decree extends beyond the parties, and is binding on the world, and the judgment fixing her *status* may be invoked against her by any one having an interest to do so, as these defendants now do. In another portion of this brief we have given the authorities fully sustaining this point.

It is of great importance then that this Court should examine the conclusions arrived at in the above decision, reported in 12 Howard.

We maintain it possesses the force of *res adjudicata* upon the following points:

First.—Upon the personal *status* of the complainant as an adulterous bastard, because it establishes *the fact* that "Des Grange was her mother's lawful husband in 1802 or 1803, when she alleges Daniel Clark married her mother."

Is not this conclusion of the Court almost in the very words of the law of Louisiana? "Adulterous bastards are those who are born from an unlawful connection between two persons who

at the time the child was conceived, were either of them, or both, connected by marriage with some other person."

Louisiana Code of 1808, Art. 5, p. 44.

This fact being established, carried with it all its legal consequences, one of which was, that the complainant was an adulterous bastard. In his dissenting opinion, given in 24 Howard at page 619, this is distinctly stated by Judge Catron, who was the organ of the Court in the former decision in 12 Howard.

Another legal consequence from this fact, is that the complainant has no capacity to inherit anything, under the express statute of Louisiana; as an adulterous bastard, she can claim alimony, but she can claim nothing else.

Second.—The Court decided not only that the complainant "was not the lawful heir of Daniel Clark," but went further, and held that "*she could inherit nothing from him.*"

Why could she "inherit nothing from him?" and *why* was she not the lawful heir of Clark?

Are not these two conclusions connected by a *therefore* with the *fact* antecedently stated of the existence of the lawful marriage of her mother with Des Grange at the date of that mother's alleged marriage with Clark?

Then it was simply because of this marriage of her mother with Des Grange, that the complainant could inherit nothing from Clark.

But *why* was this? Simply, because under the laws of the State of Lousiana above quoted, the *fact* of the existence of this lawful marriage between De Grange and the mother of complainant, at the date of her alleged marriage with Clark, demonstrated the status of the complainant to be that of an adulterous bastard. Being such, she had no capacity to inherit from Clark, (Code of 1808, p. 156, Art. 46), and hence the conclusion of the Court, "she can inherit nothing from him."

Is it remarkable then, that the Court should have said, "the question decided concludes this controversy," and then added,

"the harshness of judicial duty requires that we should deal with witnesses and evidences, and with men's rights as we find them; and it is done so here."

With that delicacy which will ever characterize the language of refined intelligence, especially in placing the conclusions of the judicial mind upon imperishable records, the Court refrained from parading the expression "adulterous bastard," because it was unnecessary, and because, as Mr. Justice Catron states, it was a legal consequence from the *factum* found.

24 Howard, p. 619.

Third. That the decree of this Court in Charles Patterson's case does not affect these defendants for two reasons: 1st. Because they were no parties to it, and 2d, *because it was no earnest controversy.*

Read the reasoning of this Court which resulted in this conclusion, to be found on pages 537 and 538, in 12 Howard; where, among other reasons, it was stated as proved by Patterson himself, that "Gen. Gaines and his wife gave him (Patterson) a writing under their hands that they would not take any property from him, and that they would make his title good, and pay the costs, if the suits was decided against him, that he (Patterson) paid most of them, and that Gen. and Mrs. Gaines refunded the money to him, that he also paid the counsel who appeared for him at Washington, but the money was refunded by Gen. and Mrs. Gaines. * * * That this proceeding, on the part of Patterson and Gen. and Mrs. Gaines was amicable, and that no earnest litigation was had *is too manifest for controversy.*"

Yet the *dictum* of the opinion in 24 Howard, would seem to have revived this defunct and really *ex parte* case, and in the absence of evidence in the record, is attempted to be used by the complainant as a proof to sustain the allegation that Clark and Zulieme were once lawfully married.

We have been educated and reared in a school of law whose

elementary instruction was to invest judicial decisions with the force of law, and to add to, rather than detract from, their binding power. When, therefore, the Patterson case had formed the subject of a protracted litigation, and passing under its searching review, this court had used the language above quoted, and solemnly decided it had no force because "it was no earnest controversy," we put faith in this expressed conclusion, and still having faith in it, invoke it as *res-adjudicata*.

Fourth.—There is still another view in which the decision in 12 Howard may be regarded as *res adjudicata*, which is this, the cause of action, to-wit: as heir under the will of 1813; was well known to the complainant, was asserted, and renounced by her, at the date of the institution of the suit decided in 12 Howard; and this being a petitory action for real estate, it was incumbent on her to state and maintain all her causes of action, all her *titles* under which she claimed to be owner in that suit. She could not thus *split up her claim* and subject the defendants to a multiplicity of suits.

The final decree in 12 Howard may, therefore, be pleaded as *res judicata* against any title which the complainant was possessed of, at the time she filed her bill in 1836, but either omitted to plead, or after pleading, renounced.

See case of W. A. Shaffer *vs.* Scuddy, 14 An. Rep. p. 575.

A party may show that "he has acquired title *since* the former trial."

4 Cowen 563–4.

So, after a claim in a petition of heirship, based upon a right of an intestate succession had been rejected, a *new claim* of the same kind will not be barred by the rejection of the first.

Zacharie Droit Civil Francaise, vol 5, p. 790.

"When a person figures in the second suit as heir to another person, *to whom he had not succeeded at the institution of the first suit.*"

Marcade Expln. du Code, vol. 5, p. 176.

"A person who, at the time of bringing a suit, can claim

under two qualities confounded in his one person before the first demand, cannot sue in one quality, and afterwards in the other. Having made a demand in one quality, he cannot separate the other, in order to commence a second claim."

Touillier, vol. X, n. 214. See also the conclusive reasoning of Pothier in his treatise on Obligations. Translation Ed. 1853, vol. 1, p. 585.

In all these and numerous other authorities that might be cited, the cause of action was *new*, arising subsequently to the date at which the issue in the first trial was made.

If the complainant had been ignorant of her claim as instituted heir, and were able to say to this Court, that it had only been since the loss of her suit as heir-at-law, she had discovered proof of her *new title* as heir under the will of 1813, then she would be entitled to a trial upon this new element of her title, and not otherwise.

No respectable authority can be produced from the Courts of any country that will sanction this demand of a second trial between the same parties for the same thing, upon an element of title or cause of action of which the party had full knowledge when the first suit was brought.

How much less is the party entitled to thus harrass these defendants a second time, when the pleadings in the former cases which have been put in evidence for this express purpose, show that she set forth this cause of action, attempted to enforce it, and then deliberately abandoned it, as is elsewhere shown.

We invite special attention to the case of Shaffer v. Scuddy, reported in 14 An. 575.

Fifth.—At the same time that the complainant abandoned her claim as heir under the will of 1813, in her amended bill of 1848, she gave that renunciation one distinct qualification, which was thus stated: "But your orator and oratrix expressly charge that they shall at all times insist upon the *fact*, that the said will of 1813, as stated in said original bill, *was made* by the said Daniel Clark, and was suppressed or destroyed, as also therein stated, so far as anything was in said bill contained,

declaring the legitimacy of your oratrix as the only child of the said Daniel Clark, born in lawful wedlock with said Zulième, née Carrière, and no further or otherwise."

See Amended Bill, v. 2, p. 78.

The defendants denied these averments, the parties went to trial upon them, and the decree dismissed the bill.

Is not that decree *res adjudicata* upon these issues thus made?

Sixth.—Article 2265 of the Louisiana Code of 1825 says: "The authority of the thing adjudged, takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be made between the same parties, and formed by them against each other in the same quality."

That the object of the judgment and thing demanded was the same, will appear from an inspection of the two bills. It was certain property therein specified as formerly belonging to the estate of Daniel Clark. That object or thing is not changed in the sense of the article, from the fact that, in the former suit, she only claimed four-fifths of it, admitting that the defendants possessed a good title to the remaining fifth, and in this suit claims title to the whole, without such admission.

The demand is not upon the same cause of action, but we have shown that she formerly set up this same cause of action, then abandoned it; and we think that we have shown that this clause must be held, when an action for real estate has been brought and decided, to apply only to some *new* cause of action; and that a litigant who thus splits up her case, and after stating a cause of action, deliberately abandons it, and proceeds to trial and judgment, the decree rendered, will have the force of *res adjudicata*, upon any cause of action thus shown to have been known to the party and waived, and especially when expressly renounced.

A contrary doctrine would result in absolute injustice and hardship upon the defendants, who are entitled to the rest which a decree should bring with it. Such protracted and costly litigation cannot be renewed upon the old issues thus waived. The demand is between the same parties or their privies; but it is contended that it is not formed against each other in the *same quality*. This term quality obviously has reference to cases when the litigants in one suit appear in a *personal* quality, and in the subsequent suit in some *fiduciary* quality, such as tutor, curator, trustee, executor, etc.

To say, that because, in the former suit, Mrs. Gaines sued as heir-at-law, and in the present one as heir under the will, she presents herself in a different *quality* within the meaning of the article quoted, is simply absurd. It simply confounds the sources of the demand, with the *quality* of person in the litigant. If Mrs. Gaines had brought her former suit in her quality as tutrix or administratrix, for example, then a decree therein would not bar a subsequent action for the recovery of the same property as belonging to her *personally*. That this is the proper construction of the word *quality* in this connection is too evident to justify further argument or illustration.

See Toullier, vol. 10, 214.

XX.—It will never be possible to obtain a decree from any tribunal which the complainant will accept as *res adjudicata*, if adverse to her pretensions.

The decision reported in 12 Howard, and now relied on as possessing that force, was rendered after a full and fair trial: after elaborate arguments had been heard from such counsel as Reverdy Johnson, Judge Campbell, Daniel Webster, Mr. Duncan, and others. And that decree must have been considered by Judge Wayne as final and conclusive, as in his dissenting opinion he recommended spiritual comfort to the complainant.

See 12 Howard, p. 597.

In the case of Goodtitle vs. Kibbe, 9 Howard, p. 478, this

Court held: "It must be a very strong case indeed, and one where mistake and error had been evidently committed, to justify this Court, after the lapse of five years, in reversing its own decision; thereby destroying rights of property which may have been purchased and paid for in the meantime, upon the faith and confidence reposed in the judgment of this Court.

See same principle announced in 3 Howard, 212.

It is a well known fact that great public confidence attached to the decree of this tribunal in 1852, as finally determining the issues now presented, because it was rendered after full hearing and elaborate argument by the ablest legal tallent in the country, and by an almost unanimous Court. Reposing confidence in that decree, many persons now made defendants in suits in the Circuit Court, bought and improved property involved in this litigation, the title to which was thought to have been quieted and settled forever by that decree. The effect of their purchases, coupled with the spread of a growing city, has in the fifteen years that have since elapsed, greatly enhanced the value of this property. And now, upon the equitable principle established in the case, reported in 9 Howard, 478, above quoted, and numerous other decisions, we ask this tribunal to adhere to the principles and legal consequences of the decree rendered in 1852.

But we are answered that the decision of this court in the case of Hennen may lay claim to the same considerations and results. We deny it! We undertake to affirm, without the fear of contradiction, that there has been not more than two sales of property made to parties accepting the Hennen title.

One was that of a lot belonging to John Slidell, against which some *ex parte* proceedings were had for *confiscation*; and the other was the lot and store recovered from Hennen himself, which the complainant sold for $2,600.

It must be admitted that an examination of the mortgage office

in the city of New Orleans shows that some other parties are interested. In Book No. 80, pages 140 and 381 will be found recorded, upon the properties claimed from these and other defendants, two mortgages given by the complainant in favor of *certain New York capitalists;* one in favor of White & Mack, given May 13, 1864, for $30,000; and the other given May 19, 1865, in favor of James Emott, for $40,000.

We mention these mortgages so as to be accurate in giving all the exceptions known to us, when making the statement that no one but the complainant and Hennen himself were interested in having the decision in the Hennen case maintained.

Some idea of the magnitude of the real interest directly involved in the decision now to be rendered by this tribunal may be realized from the announcement made to us by one of the counsel for the complainant—that application will be made to this court, should the opinion be favorable to the complainant, for an order condemning the city of New Orleans upon the principles established in the Hennen case, to pay the complainant, the purchase money received by the city in 1836 and 1846 with legal interest thereon, which together, we are informed and do not doubt, would reach the sum of about *two millions* of dollars.

Thus, for a little piece of waste land, sold in 1821, for $4,700, *to pay Clark's debts*, and subsequently, in the process of time, bought by the city, laid out in streets and squares and sold to hundreds of persons in such lots, the complainant expects to obtain a decree from this tribunal, making that little parcel of waste land realize for her the sum of *two millions*.

And we seriously say that if the principles enunciated in the Hennen case, especially as to the *bad faith* of the defendants, are adhered to, just such disastrous results would ensue.

If this be true in regard to the piece of land purchased by the City, which in 1821, sold for only $4,700, what would be the amount affected by this decree if Clark's estate was then worth a *million*, as it is claimed was the fact!

We have had no opportunity of exposing the collusive char-

acter of the Hennen suit. He has utterly failed so far, to recover anything from his warrantors who charged him with fraudulently conniving with the complainant, and we are able to present to this Honorable Court a letter written from one of the complainant's former counsel, P. C. Wright, Esq., which, as against Hennen, would establish the fact that he desired the complainant to recover her suit against him, and why!

We believe that the facts presented, will justify Your Honors in extending us a full hearing upon all the evidence, and therefore we have not allowed ourselves for a single moment to regard the decision in the Hennen case, as establishing anything. Being "no earnest controversy, it does not affect these defendants."

The mass of the defendants, sued in the Circuit Court, whose interests will be concluded by the opinion now to be rendered, know that this Court will give the issues and evidence as now presented, ample and thorough examination; and with the decree thus rendered, they will be satisfied, whatever it may be.

We commend to Your Honors the perusal of the elaborate opinion of the majority of this Court in 1852, and the dissenting opinions in 1860, written by Justices Catron and Grier, and concurred in by the late Chief Justice, as unanswerable arguments in behalf of the defendants, as opinions of weight of the highest and most distinguished character, vindicating our position, that the cause of the complainant is not sustained by law or equity.

J. McCONNELL,
MILES TAYLOR,
Solicitors for the Defendants.